

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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United States Court of Appeals for the District of Columbia

JANUARY TERM, 1936

No. 6624

826

MORRIS SINGER AND JACK NIESTADT,
APPELLANTS,

v.

BENJAMIN D. FRIEDMAN AND MUNSEY TRUST
COMPANY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED JANUARY 15, 1936.

PRINTED FEBRUARY 18, 1936.

United States Court of Appeals for the District of Columbia

JANUARY TERM, 1936

No. 6624

MORRIS SINGER AND JACK NIESTADT,
APPELLANTS,

vs.

BENJAMIN D. FRIEDMAN AND MUNSEY TRUST
COMPANY, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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United States Court of Appeals for the
District of Columbia

No. 6624.

MORRIS SINGER and JACK NEISTADT, Appellants,

vs.

BENJAMIN D. FRIEDMAN and MUNSEY TRUST COMPANY.

a Supreme Court of the District of Columbia.

Equity.

No. 59021.

MORRIS SINGER, JACK NEISTADT, Plaintiffs,

vs.

BENJAMIN D. FRIEDMAN, MUNSEY TRUST COMPANY,
Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Bill of Complaint for Accounting, Discovery and
 Rescission.*

Filed July 12, 1935.

In the Supreme Court of the District of Columbia, Holding
an Equity Court.

Equity.

No. 59021.

MORRIS SINGER, JACK NEISTADT, Plaintiffs,

vs.

BENJAMIN D. FRIEDMAN, MUNSEY TRUST COMPANY,
Defendants.

Your complainants, complaining against the defendants,
for cause of action say:

1. That your complainant Morris Singer is a resident of
the District of Columbia and a citizen of the United States,
and brings this suit in his own right; that your complain-
ant Jack Neistadt is a citizen of the United States and a
resident of the City of Baltimore, State of Maryland, and
brings this suit in his own right.

2. That the defendant Benjamin D. Friedman is a citi-
zen of the United States and a resident of the District of
Columbia, and is sued in his own right; that the defend-
ant Munsey Trust Company is a banking corporation en-
gaged in the general business of banking and finance in the
District of Columbia, with its main office in the District of
Columbia, and is sued in its own right, and as trustee for
the joint and several rights of the plaintiffs and the de-
fendant Benjamin D. Friedman, as hereinafter will more
fully appear.

3. Your complainants further respectfully show to the
Court as follows: that on, to wit: the 2nd day of
2 April, 1928, your complainants and said defendant
Benjamin D. Friedman entered into a certain part-
nership in the real estate and construction business in the
District of Columbia, under the style and name of Fried-
man, Singer and Neistadt, which said partnership con-

tinued and existed to January 14, 1931, notwithstanding the fact that previous thereto certain negotiations between the partners had been carried on for a prior dissolution of the same, none of which became effective or were consummated. That during the life of said partnership the defendant trust company became a trustee, depository and fiduciary financial agent for said partnership and each member thereof, having in its hands and in its possession securities belonging to the said partnership in large amounts and having charge and custody of the valuable real estate holdings of said partnership and collecting the rents from the same and making disbursements for the maintenance thereof; that said defendant trust company was a creditor of said partnership in that it had made from time to time various loans to said partnership secured upon notes discounted to said defendant and/or notes secured by collateral and/or real estate loans, said notes being placed with said defendant and curtailed and paid from time to time from funds belonging to said partnership coming into the hands of said defendant trust company.

4. That on or about January 1, 1931, and while said partnership between plaintiffs and defendant Benjamin D. Friedman was in full force and effect and while said defendant Munsey Trust Company was acting as trustee and fiduciary agent of plaintiffs and said defendant Friedman, said defendant trust company was in possession of a certain trust fund of more than Thirty-five thousand dollars, (\$35,000.00), which fund had been accumulated from
3 the sale of a certain second mortgage of \$50,000.00, secured on real estate at Sixth and Louisiana Avenue, Northwest, Washington, D. C., belonging to said partnership, and having been sold by said Munsey Trust Company, defendant herein, as trustee for said partnership to one McGarrity at and for the sum of Thirty-Five thousand dollars (\$35,000.00) cash, which said sum was received in trust by said defendant trust company for said partnership and each member thereof, and so held by it on said date of January 1, 1931; that on said date of January 1, 1931, said partnership was the owner of the following real estate held in trust by said defendant trustee, to wit:

(a) Lots 29 and 33, and part of Lot 32, in Square 205, same being premises 1908, 1910 Fourteenth Street, and

1407, 1409 and 1411 T Street, Northwest, Washington, D. C.

(b) Lot 24, Square 642 D. C.

(c) Lots 32 and 35, Square 5601, Nichols Ave and S Street, Southeast, Washington, D. C.

(d) Lot 85, Sq. 190, premises 1512 U Street, N. W.

Said premises 1908, 1910 Fourteenth Street, and 1407, 1409 and 1411 T Street, Northwest, being subject to a first trust of Forty-Five Thousand Dollars, (\$45,000.00), and of the gross value of Sixty-Five Thousand Dollars (\$65,000.00) and said premises located at Nichols Avenue and S Street, Southeast, being of the value of One Hundred Thousand Dollars (\$100,000.00), upon which said premises in the said District of Columbia the defendant Trust Company held, as trustee, a first mortgage on said premises belonging to the plaintiff and defendant Friedman against which there was due to said Trust Company by plaintiffs and said defendant Friedman a collateral loan of Forty-Five thousand Dollars (\$45,000.00); that said defendant trust company likewise held a first trust loan against said premises 1407, 1409 and 1411 T Street and 1908 and 1910 Fourteenth
4 Street, Northwest, in the amount of Forty-Five Thousand Dollars, (\$45,000.00); said two sums due said defendant trust company aggregating Ninety Thousand Dollars (\$90,000.00), less certain overcharges and collections of usury and wrongful and unlawful commissions and profits to be accounted for by said defendant trust company against said sum upon a full accounting and discovery herein.

5. That on, to wit: January 19, 1931, said defendant trust company, as trustee, proceeded to foreclose that certain real estate known as Lots 32 and 33, Square 5601 under said first mortgage or deed of trust of Seventy-Five Thousand Dollars (\$75,000.00) owned by plaintiffs and said defendant Friedman, as a partnership aforesaid, and did foreclose the same; that at the time of said foreclosure there was due said trust company a collateral loan, secured by a hypothecation of said Seventy-Five Thousand Dollars (\$75,000.00) first deed of trust and notes secured by the same, and no more, subject to the deductions for wrongful commissions and usury hereinabove referred to and more particularly hereinafter set out; that the said trustee proceeded to fore-

close said property and did foreclose the same at public sale at and for the price of Sixty-Five Thousand Dollars (\$65,000.00) to the defendant Benjamin D. Friedman, said foreclosure being under the terms of said deed of trust of Isador Young and wife in the sum of Seventy-Five Thousand Dollars (\$75,000.00), dated January 6, 1928 and recorded January 6, 1928, among the Land Records of the District of Columbia.

6. Plaintiffs further show that subsequent to the foreclosure aforesaid and the payment to said trustee of Sixty-Five Thousand Dollars (\$65,000.00) by said defendant Friedman, for the benefit of said plaintiffs and defendant Friedman aforesaid, that said trust company, defendant
5 herein, filed a bill to collect the deficiency on the trust debt alleged to be owing said Isador Young, and made both plaintiffs and defendant Friedman parties thereto in Equity cause #53471 and your complainants say that said defendant trust company collected, as a result of said suit, by compromise, the sum of Seventy-Five Hundred Dollars (\$7500.00) on account of a claimed deficiency against said Isador Young in the sum of \$18,172.42, which said sum of Seventy-Five Hundred Dollars (\$7500.00) went into the hands of said defendant trust company as a fund belonging to your plaintiffs and said Friedman as a partnership aforesaid, and your complainants further show that they never consented at any time to an acceptance of said sum of Seventy-Five Hundred Dollars (\$7500.00) or any sum less than the total due by said Young as a deficiency on said first deed of trust of \$75,000.00 owned by said partnership, to wit the sum of \$18,172.42, and complainants ask an accounting and discovery against said defendants for the sum of \$18,172.42, less the said sum of \$7500.00 on account thereof.

7. Your complainants say that on or about March 1, 1931, in order to ascertain the condition of the trust estate held and managed for the plaintiffs and defendant Friedman as a partnership aforesaid by the defendant trust company, that your complainant Singer sought an interview with said defendant trust company, particularly with C. H. Pope, President of said Munsey Trust Company, and requested and demanded of said defendant on or about said March 1st, 1931, a full and complete accounting from said defendant trustee of all of the affairs of said partnership and all of the funds and properties owned by said partnership in

6 which your complainants were owners of two-thirds thereof and that said trustee, through its said president, failed and refused to give your complainant Singer any of the information called for and requested by him; that your complainant wished said information in order to enable him to judge what course of conduct he should take as to said properties and the funds held by said trustee; that the failure to secure the information from said defendant trustee and its refusal to furnish the information greatly alarmed your complainants as to the condition of the trust being administered on their behalf by said defendant trust company and put them in a state of bewilderment as to what was the condition of their said properties and the funds in the hands of said trustee; that on or about the same date, and without having obtained the information required for intelligent action your complainant Singer demanded to know the state of their accounts as partners and individuals with said defendant trust company of the moneys they had on hand to their credit, which information they were unable to obtain, same being refused by said defendant, and your complainants say, on information and belief, that said information was refused to them because of an illegal, unlawful and fraudulent understanding by and between the defendants herein in order that the defendant Friedman might thereafter gain preference, advantage and priority of interest in the joint assets and properties of said partnership, and frighten your complainants to dispose of their interest in said partnership at a price and cost far less than its real value.

8. Your complainants now state on information and belief that on, to wit: the 5th day of April, 1931, said defendant trust company had on hand belonging to and being the property of plaintiffs and said defendant Friedman
7 a sum, in cash, in excess of One Hundred and Ten Thousand Dollars, (\$110,000.00) from the transactions herein described and other transactions handled by said defendant trust company as trustee; that there was due said trust company by said partnership a sum not to exceed Seventy-Five Thousand Dollars (\$75,000.00) and that said partnership in addition to said cash assets on said date of April 5th, 1931, were likewise the owners of real estate in said District of Columbia, as follows: to wit:

- (a) Premises 1908, 1910 Fourteenth Street, and 1407, 1409, 1411 T Street, Northwest;
- (b) 1512 U Street, Northwest;
- (c) Nichols Avenue & S Street, Southeast.
- (d) Lot 24, Square 642, D. C.

all of which funds and property said defendant trustee was in charge of the custody of and handling for said plaintiffs and said defendant Friedman.

9. Your complainants further say that when they demanded the information as to the status of their accounts of said defendant trustee on to wit the 1st day of March, 1931, they did not learn, and were refused knowledge of the facts which they are now advised of; that said trustee at that time was in possession of more than One Hundred and Ten Thousand Dollars (\$110,000.00) of cash assets belonging to them and in possession of said real estate likewise belonging to them, as such partnership, that instead of furnishing said information to plaintiffs, as it was its duty to do, that subsequently the trustee refused the same and furnished such information only to the defendant Friedman, and that the plaintiffs, failing to receive said information and being alarmed by the threats of foreclosure against their said property, and not knowing of the value of the same and of the assets in the hands
8 of said trustee, were wrongfully and fraudulently induced by the defendant Friedman, in cooperation with the defendant trust company, to enter into an improvident and fraudulent agreement of settlement and compromise between plaintiffs and said defendant Friedman, and likewise caused to enter into an improvident and wrongful and fraudulently induced release by plaintiffs of the defendant trust company of and from all obligations then outstanding in favor of plaintiffs and against said defendants, a copy of said agreement with said Friedman being attached hereto as Exhibit A and a copy of said alleged release to said trust company being attached hereto as Exhibit B; that each of said agreements were wrongfully procured by said defendants, and that plaintiffs were induced to sign the same because of lack of information denied to them by the defendant trust company, as trustee, and by defendant Friedman as a member of their partnership of

Friedman, Singer and Neistadt, and that had they been furnished full information to which they were rightfully entitled they would have demanded a distribution of the assets of the said partnership in equal amounts to themselves and the defendant Friedman after the payment of all outstanding debts and obligations legally due said defendant trust company and all other persons.

10. Your complainants further show that from 1928 to April, 1931, inclusive, and from April, 1931, to date, said defendant trust company and said defendant Friedman have received and handled and failed to account to your complainants rents and profits from the real estate herein and heretofore described, which said rents and profits amounted to many thousands of dollars and an accounting of which your plaintiffs demand against said defendants. Likewise said defendants have failed to account to your
9 plaintiffs for the disbursements by them made in the handling of the real estate aforesaid and in the collection of the cash funds from the various sources herein mentioned, and which accounts and things your plaintiffs demand a discovery and accounting.

11. Your complainants further show that said defendant trust company, while acting as trustee for said partnership, required and exacted large fees and bonuses on account of loans made by it to said partnership and upon the properties belonging to said partnership, which said bonuses and loans were usurious and illegal and your complainants demand an accounting as to all such items and charges collected as aforesaid.

12. Your complainants further show that on, to wit: May 29, 1931, they were wrongfully and fraudulently induced to make and deliver to the defendant Friedman a deed conveying Lots 29 and 33 and part of Lot 32, in Square 205, and Lot 24 in Square 642, and Lot 85 in Square 190; that said property was so deeded and conveyed to said defendant Friedman because of the wrongful and false inducements given plaintiffs aforesaid, and because of their inability to secure from the defendant trust company and defendant Friedman direct information as to their rights in and to said real estate and to other properties and assets belonging thereto.

13. Your complainants show that they have used all possible diligence and patience in an endeavor to secure from the defendant trust company, trustee as herein alleged, a full and complete accounting of the affairs of these plaintiffs and said defendant Friedman, as members of the partnership of Friedman, Singer and Neistadt, as in this bill alleged, but have been utterly unable to secure an
10 accounting or discovery of the real facts in the possession of said defendant trust company; that much of the record information as to said transactions were made and kept by said defendant trust company, as such trustee, for the benefit of the complainants and said partnership, and that many of the facts are peculiarly within the knowledge of said defendant trust company in its trust capacity as fiduciary agent for plaintiffs and said partnership; that in their effort to procure said information and to avoid a proceeding in court therefor that your complainants, on, to wit: June 28th, 1935, caused to be dispatched to said defendant trust company a letter from their counsel, copy of which is attached hereto and marked Exhibit "C", and your complainants say that they have received no answer from said demand, although same was the third request for an accounting by said defendant trust company, except your complainants say that an officer of the defendant trust company, one Radcliffe, called up the counsel of your complainants and said he was not in position to furnish the information called for by said letter of June 28, 1935, and asked your complainants to delay their demand for said information until the return to Washington of the president of said defendant trust company, who is on vacation, which said request your complainants were unwilling to grant, and whereupon they instructed their counsel to proceed with the preparation and filing of their bill of complaint as herein presented.

Wherefore, complainants pray:

(1) That process of this Court issue to the defendants requiring them to answer the exigencies of this bill.

(2) That a receiver for the properties, real and personal, and all cash and other assets belonging to plaintiffs and the defendant Friedman, as a partnership,
11 as set out in the bill of complaint, be appointed with authority to take over the control and management

of said properties and collect the rents thereon, subject to the final order of this Court.

(2½) That the partnership of Friedman, Singer and Neistadt be dissolved and all of the assets belonging thereto be distributed equitably between the plaintiffs and the defendant Friedman as their interests may appear.

(3) That the defendants and each of them be restrained and enjoined from conveying away or hypothecating, or in any manner affecting the title to said properties pending the final order of this Court.

(4) That the alleged agreement of compromise and settlement entered into between the plaintiffs and defendant Friedman and the contemporaneous and mutual release executed between the complainants and defendant Friedman, including a release by complainants of the defendant trust company, be and each of them rescinded and declared void and of no effect; that all debts and conveyances between complainants and defendant Friedman, wherein complainants undertake to convey their interest in the real estate described in the bill of complaint to said defendant Friedman be rescinded and for naught held.

(5) That any and all acquittances, receipts, releases or other documents in any wise evidencing an alleged release by complainants to either of the defendants, on account of the reasons alleged in this bill of complaint, be rescinded and declared of no effect.

(6) That the defendant Friedman, in his individual capacity, be required to account to your complainants as to all profits and receipts from all of the real estate and cash assets belonging to plaintiffs and said defendant, whether in the hands of the defendant trust company, as trustee, or in the hands of said defendant Friedman, said accounting to include all disbursements and charges of any and all kinds made by said Friedman, said accounting of receipts and disbursements to cover the period of time from the beginning of said partnership to date, and to include all funds in any wise received from or disbursed for either and all of said tracts of real estate described in the bill of complaint and other tracts of real estate owned by said partnership during the life thereof, including all rents and profits and the proceeds of all sales, exchanges and transfers of said property at any time from the beginning of said partnership to the date of the final decree herein.

(7) That the said defendant Munsey Trust Company, as a corporation and as a corporate trustee be required to account to complainants, in detail, for all moneys received and handled by it growing out of the rents and profits of any of the real estate owned by the complainants and defendant Friedman, whether the title of same was in their name, or the names of either of them, or the defendant trust company, as trustee, and that said defendant trust company likewise account for all moneys received from the proceeds of the sale of any real estate owned by said plaintiffs and defendant Friedman, or the proceeds of loans thereon, or exchanges, or sales thereof, the collection of all rents and disbursements on account of the management thereof, together with an accounting as to all proceeds from the discounting of notes of said partnership, or any of the members thereof, on account of the said partnership, the placing of all loans upon the real estate described in said bill of complaint on any other real estate owned by said partnership, of which said trust company acted as trustee, from the beginning of said partnership to the date of the

13 final order of this Court.

(8) That the said defendants and each of them be required to produce and discover to this Court all documents held by them alleged to be releases or discharges of any rights of your complainants, or any obligations due your complainants by said defendants, and any and all deeds executed by your complainants or said defendants on any real estate owned and controlled by your complainants and said defendant Friedman as partners, whether held by said partnership or any of them, or in the name of said defendant trust company, in order that said deeds, instruments, releases and any other alleged documents held by said defendants, or either of them, as an alleged receipt or discharge of obligations to these defendants by said complainants may be finally rescinded and canceled and declared void by the final decree of this Court.

And for such other and further relief as to the Court may seem proper.

MORRIS SINGER,
JACK NIESTADT,
Complainants.

McNEILL & McNEILL,
By R. H. McNEILL,
SAMUEL LEBOWITZ,
Attorneys for Complainant.

DISTRICT OF COLUMBIA, ss:

Personally appeared before me Morris Singer and Jack Niestadt, who being first duly sworn, depose and say: that they have read the foregoing Bill of Complaint by them subscribed, and that the matters and things therein
14 stated of their own knowledge are true, and the facts therein stated on information and belief they believe to be true.

MORRIS SINGER.
JACK NIESTADT.

Subscribed and sworn to before me this 11th day of July, A. D. 1935.

[NOTARIAL SEAL.]

MARY H. SHADRICK,
Notary Public, D. C.

My commission expires April 25, 1939.

EXHIBIT "A".

This Agreement, made this — day of April, 1931, by and between Benjamin D. Friedman, party of the first part and Morris Singer and Jack Niestadt, parties of the second part, Witnesseth:

Whereas, the parties hereto have been partners in the real estate and construction business and own certain properties and other assets now held by the Munsey Trust Company as trustee, under an assignment heretofore made and which assignment specifically sets forth all the property and assets of the said partnership, and,

Whereas, the partnership is indebted unto the Munsey Trust Company for loans and other advances heretofore made to the said partnership and the said parties of the second part desire to be released from these obligations and terminate this partnership upon certain terms and conditions hereinafter stated,

Now, therefore, in consideration of the premises and of other valuable consideration, each to the other pass-
15 ing, it is hereby mutually agreed as follows:

1. The parties of the second part hereby assign, transfer and convey to the party of the first part all their right, title and interest in and to all property and assets heretofore conveyed and now held by the Munsey Trust Company as trustees and further agree at any time hereafter to make

such further assurances for the more effectual conveying of the property and assets as may be required by them.

2. The party of the first part in consideration thereof agrees to pay to the parties of the second part or their attorneys, contemporaneously with the signing of this agreement the sum of Eight Thousand Dollars (\$8,000) payable as follows: Six Thousand Dollars (\$6,000) cash and a promissory note of Two Thousand Dollars (\$2,000) signed by Benjamin D. Friedman and payable at the rate of One Hundred Dollars (\$100) per month, dated April 10, 1931.

3. The party of the first part agrees to relieve the parties of the second part from all responsibility of liability arising out of the present partnership indebtedness and to protect and save harmless the parties of the second part from any and all liability arising by virtue of the present indebtedness of the partnership to the Munsey Trust Company or the Equitable Company of Washington, D. C. and agrees to exhibit to the parties of the second part all notes heretofore signed by the parties of the second part in connection with the aforesaid partnership marked cancelled and paid.

4. Each of the parties hereto, upon the consummation of this agreement, agree to execute mutual releases releasing each other from all claims of every character arising by virtue of the aforesaid partnership agreement and further agree to release the Munsey Trust Company as trustees from any and all claims arising by virtue of the aforesaid trust.

5. Upon the consummation of this agreement and the execution of the releases aforesaid, the aforesaid partnership shall stand as dissolved and terminated.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first herein-
16 before written.

_____. [SEAL.]
_____. [SEAL.]
_____. [SEAL.]

Witness:

_____.
_____.
_____.

EXHIBIT "B".

Know All Men by These Presents, that we, Morris Singer, and Ella Singer, his wife, of the City of Washington, Dis-

trict of Columbia, and Jack Niestadt, unmarried, of Baltimore, Maryland, for and in consideration of the sum of Eight Thousand Dollars (\$8,000.00) payable as follows: Six Thousand Dollars (\$6,000.00) cash and a promissory note of Two Thousand Dollars (\$2,000.00) signed by Benjamin D. Friedman and payable at the rate of One Hundred Dollars (\$100.00) per month, and dated April 10, 1931, the receipt whereof is hereby acknowledged, have released, remised and forever discharged and by these presents for themselves, their heirs, executors, administrators, and assigns do hereby release, remise and forever discharge the said Benjamin D. Friedman, his heirs, executors, administrators and assigns, and the Munsey Trust Company, a corporation, its executors and assigns of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckoning, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, damages, judgments, claims and demands whatsoever in law or in equity which against them the undersigned ever had, now has or which their heirs, executors, administrators or assigns hereafter can, shall or may have, upon or by reason of any matter, cause or

17 thing whatsoever from the beginning of the world to the date of these presents. Especially but not in limitation of releasing the above mentioned parties from any claim that the undersigned may have by reason of a certain partnership heretofore existing between Benjamin D. Friedman, Morris Singer and Jack Niestadt and against the said Munsey Trust Company as trustees.

In Witness Whereof the parties hereto have hereunto set their hands and seals this — day of April, 1931.

— — —. [SEAL.]

— — —. [SEAL.]

— — —. [SEAL.]

DISTRICT OF COLUMBIA, *to wit*:

I, — — —, a notary public in and for the District of Columbia, do hereby certify that Morris Singer, Ella Singer his wife, and Jack Niestadt, parties to a certain deed of release, bearing date on the — day of April, 1931, and hereto annexed, personally appeared before me in said District the said Morris Singer, Ella Singer, his wife, and Jack Niestadt being personally well known to me as the per-

sons who executed the said deed of release and acknowledged the same to be their act and deed.

Given under my hand and seal this — day of April, 1931.
———. [SEAL.]

18

(EXHIBIT "C".)

June 28, 1935.

Munsey Trust Company,
Washington, D. C.

In re Partnership of Friedman, Singer & Niestadt, Third
Request for Accounting.

GENTLEMEN :

To our surprise and regret you have failed twice to furnish us with the information requested as to your receipts and disbursements from properties jointly owned from 1928 to 1931 by Messrs. Friedman, Singer and Neistadt. Also you have failed to furnish us information as to the sales and disposition of the properties owned by this partnership, for which you acted as trustee, requested by us on behalf of Mr. Morris Singer, one of the partners. As a reason for this failure to furnish us with this information you have referred us to Milton King, Esquire, who formerly acted as attorney for this partnership. Mr. King has, in turn, been requested by us to furnish the information and has indicated a willingness to do so, but two weeks have passed and we have not been furnished with the accounting necessary to enable us to act with the clearest understanding of the facts. We are, therefore, submitting to you this third request for a full and complete accounting of all matters and transactions handled for the partnership of Friedman, Singer and Niestadt during the period aforesaid, and we also request such information as you have as to the transfer of titles, the placing of encumbrances, and the payment thereof, and the sales of any of the properties aforesaid to date, in so far as your company has acted as trustee and has information with respect thereto.

In order to have you understand more clearly some of the detail information which we desire, we desire to bring to your attention certain specific inquiries upon which we want specific information :

(1) It is our understanding that about January 1, 1931, the partnership had in your bank, as a trust fund, a sum

in excess of \$35,000.00, which has been accumulated from the sale of the second mortgages and other assets owned by the partnership on property located at 6th and Louisiana Avenue. This fund, of course, belonged jointly in equal thirds to each of the partners.

(2) On January 19, 1931, the trustees, under a first deed of trust of \$75,000.00, owned by the partnership, sold premises on Lots 32 and 33, in Square 5601, to Ike Young for \$65,000.00. The trustees under this trust were officers of your bank, and the transaction was closed by them and the proceeds received by them to the full extent of \$65,000.00, and this fund, of course, went to the credit of Friedman, Singer and Neistadt, less the expenses of the sale.

19 (3) At the time of the above funds coming into your hands, totaling approximately \$100,000.00, we are advised that the partnership then owed to your institution a total of approximately \$90,000,—\$45,000 secured collaterally by the \$75,000 first trust of Ike Young, and the other \$45,000 being represented by a first trust on real estate located at 1407-9-11 T Street, N. W., and 1908-10 14th Street, N. W. In addition to the above funds received by you, in trust, we are advised that you had been collecting rents from 1928 to 1931 on all of the properties of the partnership, which rents amounted in excess of \$30,000. Of course, we understand that there were expenditures made by your company as trustee against these properties during this period of time, no accounting of which, however, has ever been furnished our client as we are advised.

You will note from the above figures that the amount of moneys received by you from the collection of the second mortgage on the 6th & Louisiana Avenue property and the money received from the sale of the gasoline property to Ike Young of \$65,000 were sufficient alone to pay off and discharge all the loans of the partnership, leaving in your hands a substantial sum of money, and leaving free and clear of any lien the property at 14th Street, of the fair and reasonable value of \$75,000 or more.

Subsequent to the above we are advised that you brought suit and collected a deficiency judgment of \$7500 against Mr. Young.

Our clients insist that they must have an immediate accounting in detail from your corporation on the above and

all other related points, and insist that they have not had an accounting. They say they do not know what went with the moneys above referred to and they assure us that had they known fully of the financial situation of their properties in January, February and March of 1931, they never would have signed certain assignments and agreements which were executed; that these papers were executed upon misleading statements and upon failure to procure information requested for the exercise of their sound judgment. This information was denied them. They having now obtained generally the information above recited, must insist upon a complete showing of the handling of their affairs and if they cannot obtain it very promptly we are instructed to file a bill for an accounting and discovery to obtain this information.

In order to be entirely fair with your institution we have felt called upon to give you this third request for the information we have heretofore requested furnishing you more details of what we want and why we want it and we respectfully ask that we have a detailed answer by Tuesday morning next.

We are taking the liberty of sending a copy of this letter to Mr. Milton King for his information.

Very truly yours,

(Sgd.)

McNEILL & McNEILL,
By R. H. McNEILL.

RHMcN: EA.

20 *Motion of the Munsey Trust Company to Dismiss
Bill of Complaint.*

Filed July 31, 1935.

* * * * *

Now comes the defendant, The Munsey Trust Company, by its attorney, and moves the court to dismiss the bill of complaint filed in the above entitled cause upon the following grounds:

(1) That the said bill of complaint does not set forth any facts which constitute a cause of action in equity against this defendant.

(2) That the said bill of complaint does not set forth any facts which would entitle the plaintiffs to the relief prayed for therein.

(3) That the said bill of complaint on its face shows that all of the rights asserted therein were finally settled and adjusted between the plaintiffs and this defendant and a release of this defendant executed by the plaintiffs and delivered to this defendant.

(4) That the said bill of complaint does not set forth any facts which in law or in equity amount to a fraud alleged to have been perpetrated by this defendant on the plaintiffs in the procurement of the execution and delivery of the said release releasing this defendant of any claims of the plaintiffs as alleged in the said bill of complaint.

(5) That the said bill of complaint on its face shows that the plaintiffs have been guilty of laches which disentitles the plaintiffs to the relief therein prayed.

(6) That the plaintiffs waived their right to complain of the refusal of this defendant to furnish it with the information concerning the status of their accounts
21 when the plaintiffs, notwithstanding said refusal, subsequently executed the contract and release marked "Exhibits A and B."

(7) And for other reasons and imperfections appearing upon the face of the said bill of complaint.

R. H. YEATMAN,
Attorney for Defendant,
The Munsey Trust Company.

*Motion of Defendant, Benjamin D. Friedman, to Dismiss
Bill of Complaint.*

Filed August 3, 1935.

* * * * *

Now comes the defendant, Benjamin D. Friedman, by his attorney, and moves the court to dismiss the bill of complaint filed in the above entitled cause upon the following grounds:

(1) That the said bill of complaint does not set forth any facts which constitute a cause of action in equity against this defendant.

(2) That the said bill of complaint does not set forth any facts which would entitle the plaintiffs to the relief prayed for therein.

(3) That the said bill of complaint on its face shows that all of the rights asserted therein were finally settled and adjusted between the plaintiffs and this defendant and a release of this defendant executed by the plaintiffs and delivered to this defendant.

(4) That the said bill of complaint does not set forth any facts which in law or in equity amount to a fraud alleged to have been perpetrated by this defendant on the plaintiffs in the procurement of the execution and
22 delivery of the said release releasing this defendant of any claims of the plaintiffs as alleged in the said bill of complaint.

(5) That the cause of action asserted in the bill of complaint did not accrue within three years and is barred by the Statute of Limitations.

(6) That the said bill of complaint on its face shows that the plaintiffs have been guilty of laches which disentitles the plaintiffs to the relief therein prayed.

(7) That the plaintiffs waived their right to complain on the refusal of the defendant, The Munsey Trust Company, to furnish them with the information concerning the status of their accounts when the plaintiffs, notwithstanding said refusal, subsequently executed the contract and release marked "Exhibits A and B."

(8) That the conduct of the plaintiffs as shown on the face of the bill of complaint discloses a reaffirmance of the contract, and a waiver of any alleged right to rescind by reason of the acceptance and retention of the benefits of the contract including the receipt of monthly payments from this defendant for a period of twenty months from April 10, 1931.

(9) And for other reasons and imperfections appearing upon the face of the said bill of complaint.

ALFRED M. SCHWARTZ,

Attorney for Defendant,

Benjamin D. Friedman.

Memorandum of Justice Proctor.

In my opinion the bill clearly shows plaintiff to be guilty of laches. Accordingly the motions to dismiss bill will be granted with ten days to file amended bill.

PROCTOR, J.

Oct. 28/35.

Order Granting Motions to Dismiss.

Filed October 31, 1935.

* * * * *

Upon consideration of the motions of the defendants, Benjamin D. Friedman and The Munsey Trust Company, to dismiss the Bill of Complaint filed herein, it is by the Court this 31st day of October, 1935,

Ordered that the said motions of the defendants to dismiss the said Bill of Complaint be and they each are granted, with leave to the plaintiffs to file an amended bill of complaint within ten days from the date hereof, and upon the failure of the plaintiffs so to amend within said ten days, the Bill of Complaint shall stand dismissed.

JAMES M. PROCTOR,

Justice.

O. K. as to form:

R. H. McNEILL,

Atty. for Comp'l'ts.

R. H. YEATMAN,

Atty. for Def'd't, Munsey Trust Co.

A. M. SCHWARTZ,

Atty. for Def'd't, Benj. D. Friedman.

Amendments to Bill of Complaint for an Accounting, Discovery and Rescission.

Filed November 2, 1935.

* * * * *

Your complainants, by leave of Court first had and obtained, amend their complaint herein filed in the following terms, to wit:

9 A. Complainants say that as to all allegations of facts set out in detail in paragraphs 4, 5, 6, 7, 8 and 9 inclusive in their original bill of complaint herein filed were only discovered by them and made known to them in a manner sufficiently definite upon which they could base an action on or about May 15, 1935; that prior to said date on or about June 1, 1934, being suspicious of the conduct of the defendant, and particularly of the failure and refusal of the defendants, and especially the defendant Munsey Trust Company to permit plaintiff access to the information in possession of said company as to the properties of the plaintiffs; that they then on to wit: June 5, 1934 sought the advice of Michael J. Colbert, Esquire, a member of the Bar of the District of Columbia, with respect to their rights, and that they relied upon said M. J. Colbert to investigate the merits of their belief that they had probably been wronged and defrauded by the defendants herein; that said M. J. Colbert retained the papers and documents deposited with him by the complainants for a long space of time, to wit: from June 5, 1934, to May 15, 1935, without definite action thereon; that up to said time the only information as to the wrongs and frauds practiced by the defendants against plaintiffs, which they had were indefinite and unsubstantial and of too uncertain character upon which a suit

could be based; that on or about May 20, 1935, plaintiffs, in the further effort to discover the facts as to the frauds and wrongs practiced against them as set out in paragraphs 4 to 9 inclusive of their said original complaint, sought the advice and assistance of their present counsel and employed said counsel to specifically trace the records and documents and other sources of information, of which complainants were possessed of only an indefinite and unsubstantial foundation, and run the same down and advise complainants as to whether or not they were entitled to bring a bill in equity against said defendants for an accounting, discovery and rescission; that thereafter and within a very short time, to wit: between May 20, 1935, to July 12th, 1935, that complainants' said counsel investigated the books and records of the District of Columbia, and other sources of information furnished them by complainants and made a report of their said investigations to your complainants, and that upon receiving said report disclosing the allegations of fact set out in paragraphs 4

to 9 inclusive of said original bill of complaint that your complainants became convinced that the facts set out in said paragraphs in said original bill of complaint were true and correct, and your complainants then for the first time discovered the real basis of the action by them instituted against the defendants and thereupon instructed their said counsel to institute this suit and that thereupon, after the preparation of the bill of complaint by said counsel, your complainants duly verified and filed the same; that the allegations made by this amendment with respect to the dates of the discovery of the facts in said paragraphs set out by your complainants was inadvertently omitted from the original bill of complaint.

26 9 B. Your complainants further show that the defendants fraudulently confederated together against your complainants in that while your complainants and said Benjamin D. Friedman were partners and while the said defendant trust company was trustee for the partnership of Friedman, Singer and Neistadt, and disregarding its duty to said partnership and each member thereof, said trust company, by some of its executive officers, entered into a business corporation with said defendant Friedman, to wit: a corporation known and designated as the F. W. & P. Company, Inc., under the laws of the State of Delaware, and your complainants say that the entering into said partnership between said defendant Friedman and said trust company was a fraudulent and wrongful act in that it amounted to an agreement between said defendants hostile in nature and unfriendly in character to your complainants and their interests and became the basis of the subsequent wrongs and fraudulent actions practiced against your complainants as set out in paragraphs 4 to 9 inclusive of their original bill of complaint.

MORRIS SINGER,
Complainant.

McNEILL & McNEILL,
By R. H. McNEILL,
SAMUEL LEBOWITZ,
Attorneys for Complainants.

DISTRICT OF COLUMBIA, ss:

Personally appeared before me Morris Singer, who being first duly sworn, deposes and says: that he has read the

foregoing Amendments to Bill of Complaint for an Accounting, Discovery and Rescission, by him subscribed, and that the matters and things therein stated of his own
27 knowledge are true, and the facts therein stated on information and belief he believes to be true.

MORRIS SINGER.

Subscribed and sworn to before me this 1st day of November, A. D. 1935.

[NOTARIAL SEAL.]

LOUIS ROSENBERG,
Notary Public, D. C.

*Motion of Defendant, Benjamin D. Friedman, to Dismiss
Bill of Complaint as Amended.*

Filed November 7, 1935.

* * * * *

Now comes the defendant, Benjamin D. Friedman and moves the Court to dismiss the Bill of Complaint as amended, filed in the above entitled cause upon the following grounds:

1. That the said Bill of Complaint as amended does not set forth any facts which constitute a cause of action in equity against this defendant.

2. That the said Bill of Complaint as amended does not set forth any facts which would entitle the plaintiffs to the relief prayed for therein.

3. That the said Bill of Complaint as amended on its face shows that all of the rights asserted therein were finally settled and adjusted between the plaintiffs and this defendant and a release of this defendant executed by the plaintiffs and delivered to this defendant.

4. That the said Bill of Complaint as amended does not set forth any facts which in law or in equity amount to a fraud in the procurement of the execution and delivery of the said release, by which this defendant
28 was released of any claims of the plaintiffs as alleged in the said Bill of Complaint as amended.

5. That the cause of action asserted in the Bill of Complaint as amended did not accrue within three years and is barred by the Statute of Limitations.

6. That the said Bill of Complaint as amended on its face shows that the plaintiffs have been guilty of laches which disentitles the plaintiffs to the relief therein prayed.

7. That the amendment does not disclose any sufficient reason why the plaintiffs waited until July 12, 1935 to take action upon the alleged fraud of the defendants in refusing about March 1, 1931 to disclose to them on their demand the condition of the partnership.

8. That the Bill as amended, does not disclose why the facts alleged to have been discovered between May 20th and July 12th, as alleged in Paragraph 9A, were not sooner discovered.

9. That the plaintiffs waived their right to complain on the refusal of the defendant, The Munsey Trust Company, to furnish them with the information concerning the status of their accounts when the plaintiffs, notwithstanding said refusal, subsequently executed the contract and release marked "Exhibits A and B".

10. That the Bill of Complaint as amended does not restore or offer to restore that which the plaintiffs received from this defendant which should be a condition precedent to any attempt by the plaintiffs to rescind.

11. That the conduct of the plaintiffs as shown on the face of the Bill of Complaint as amended disclosed
29 a reaffirmance of the contract, and a waiver of any alleged right to rescind by reason of the acceptance and retention of the benefits of the contract including the receipt of monthly payments from this defendant for a period of twenty months from April 10, 1931.

12. And for other reasons and imperfections appearing upon the face of the said Bill of Complaint as amended.

ALFRED M. SCHWARTZ,

Attorney for Defendant,

Benjamin D. Friedman.

Motion of Defendant, the Munsey Trust Company, to Dismiss Bill of Complaint as Amended.

Filed November 7, 1935.

* * * * *

Now comes the defendant, The Munsey Trust Company, and moves the court to dismiss the bill of complaint as

amended, filed in the above entitled cause, upon the following grounds:

1. That the said bill of complaint as amended does not set forth any facts which constitute a cause of action in equity against this defendant.

2. That the said bill of complaint as amended does not set forth any facts which would entitle the plaintiffs to the relief prayed for therein.

3. That the said bill of complaint as amended on its face shows that all of the rights asserted therein were finally settled and adjusted between the plaintiffs and this defendant and a release of this defendant executed by the plaintiffs and delivered to this defendant.

4. That the said bill of complaint as amended does
30 not set forth any facts which in law or in equity amount to a fraud in the procurement of the execution and delivery of the said release, by which this defendant was released of any claims of the plaintiffs as alleged in the said bill of complaint as amended.

5. That the cause of action asserted in the bill of complaint as amended did not accrue within three years and is barred by the statute of limitations.

6. That the said bill of complaint as amended on its face shows that the plaintiffs have been guilty of laches which disentitles the plaintiffs to the relief therein prayed.

7. That the amendment does not disclose any sufficient reason why the plaintiffs waited until July 12th, 1935, to take action upon the alleged fraud of the defendants in refusing about March 1st, 1931, to disclose to them on their demand the condition of the partnership.

8. That the bill as amended does not disclose why the facts alleged to have been discovered between May 20th and July 12th, as alleged in Paragraph 9A, were not sooner discovered.

9. That the plaintiffs waived their right to complain on the refusal of this defendant to furnish them with the information concerning the status of their accounts when the plaintiffs, notwithstanding said refusal, subsequently executed the contract and release marked "Exhibits A and B."

10. That the bill of complaint as amended does not restore or offer to restore that which the plaintiffs received

from the defendants which should be a condition precedent to any attempt by the plaintiffs to rescind.

11. That the conduct of the plaintiffs as shown on the face of the bill of complaint as amended disclosed
31 a reaffirmance of the contract, and a waiver of any alleged right to rescind by reason of the acceptance and retention of the benefits of the contract, including the receipt of monthly payments from the defendant, Benjamin D. Friedman, for a period of twenty months from April 10th, 1931.

12. And for other reasons and imperfections appearing upon the face of the said bill of complaint as amended.

R. H. YEATMAN,
Attorney for Defendant,
The Munsey Trust Company.

Final Decree Dismissing Bill.

Filed November 15, 1935.

* * * * *

Upon consideration of the motions of the defendants, Benjamin D. Friedman and The Munsey Trust Company, to dismiss the Bill of Complaint as Amended, it is by the Court this 25th day of November, 1935,

Ordered that the said Motions to Dismiss be and they are hereby granted, and the plaintiffs, Morris Singer and Jack Neistadt having elected to stand on said Bill as Amended, it is further

Adjudged, ordered and decreed that the Bill of Complaint as Amended be and the same is hereby Dismissed, and that the defendants recover of the plaintiffs their costs.

JENNINGS BAILEY,
Justice.

From the foregoing decree the plaintiffs note in open court an appeal to the United States Court of Appeals for the District of Columbia and the undertaking on appeal for costs is hereby fixed in the maximum penalty of \$100.00 or in lieu thereof the sum of \$50.00 in cash to be deposited with the Clerk of the Court.

32

JENNINGS BAILEY,
Justice.

O. K. as to form:

R. H. McNEILL,
SAMUEL LEIBOWITZ,
Attorneys for Plaintiffs.
ALFRED M. SCHWARTZ,
Attorney for Defendant,
Benjamin D. Friedman.
R. H. YEATMAN,
Attorney for Defendant,
The Munsey Trust Co.

Memorandum.

November 30, 1935.—Bond \$100 on appeal of plaintiffs approved and filed.

Assignments of Error.

Filed December 10, 1935.

* * * * *

The court erred in granting motion to dismiss Bill of Complaint as amended in the following particulars, that is to say:

1. The court erred in holding that the Bill of Complaint was without equity, and in dismissing the same.

2. The Court erred in holding that laches barred the plaintiffs' claim.

3. The Court erred in holding that plaintiffs' cause
33 of action was barred by the Statute of Limitations of three years.

4. The Court erred in entering a decree in favor of the defendants.

R. H. McNEIL,
GEO. H. McNEIL,
SAMUEL LEBOWITZ,
Attorneys for Plaintiffs.

Service of a copy acknowledged this 9th day of December, 1935.

ALFRED M. SCHWARTZ,
R. H. YEATMAN,
Attorneys for Defendants.

Designation of Record on Appeal.

Filed December 10, 1935.

* * * * *

The clerk of the Court will please prepare for the record on Appeal to the United States Court of Appeals for the District of Columbia, the following:

1. Bill of Complaint with exhibits A through to C, attached thereto, filed July 12, 1935.
2. Motion to dismiss Bill of Complaint filed on behalf of the Munsey Trust Co., filed July 31, 1935.
3. Motion to dismiss Bill of Complaint filed on behalf of Benjamin Friedman, filed August 3rd, 1935.
4. Order of Court granting motion to dismiss Bill of Complaint, filed October 31, 1935.
5. Amendment to Bill of Complaint, filed on November 2, 1935.
6. Motion to dismiss Bill of Complaint as amended
34 filed by Benjamin D. Friedman, filed November 7th, 1935.
7. Motion to dismiss Bill of Complaint as amended filed by Munsey Trust Co., filed November 7th, 1935.
8. Final Decree dismissing Bill, filed November 25, 1935.
9. Memorandum of Undertaking on Appeal, filed November 30, 1935.
10. Assignments of Error.
11. Designation of Record.

ROBERT H. McNEILL,
GEORGE H. McNEILL,
SAMUEL LEBOWITZ,
Attorneys for the Plaintiffs.

Service of a Copy acknowledged this 9th day of December, 1935.

ALFRED M. SCHWARTZ,
R. H. YEATMAN,
Attorneys for the Defendants.

35 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 34, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 59021 in Equity, wherein Morris Singer and Jack Neistadt are Plaintiffs and Benjamin D. Friedman and Munsey Trust Company are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 9th day of January, 1936.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

By CHAS. B. COFLIN,
Ass't Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 6624. Morris Singer and Jack Neistadt, appellants, vs. Benjamin D. Friedman and Munsey Trust Company. United States Court of Appeals for the District of Columbia. Filed Jan. 15, 1936. Henry W. Hodges, Clerk.

(7375-C)

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

IN THE **FILED** MAR 10 1936

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA *V. Hodges*

CLERK

No. 6624.

MORRIS SINGER and JACK NEISTADT,
APPELLANTS,

vs.

BENJAMIN D. FRIEDMAN and THE MUNSEY
TRUST COMPANY,
APPELLEES.

BRIEF FOR APPELLANTS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

ROBERT H. McNEILL,
GEORGE H. McNEILL,
SAMUEL LEBOWITZ,
Attorneys for Appellants.

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**IN THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA**

No. 6624.

MORRIS SINGER and JACK NEISTADT,
APPELLANTS,
VS.
BENJAMIN D. FRIEDMAN and THE MUNSEY
TRUST COMPANY,
APPELLEES.

BRIEF FOR APPELLANTS.

Statement of the Case.

This is an appeal from the final decree of the Supreme Court of the District of Columbia, dismissing the bill of complaint, as amended, brought by appellants to obtain:

(a) A receiver for the real and personal property involved in the litigation;

(b) A dissolution of the partnership between appellants and the appellee Friedman;

(c) An injunction to prevent hypothecation or other disposition of the property in dispute;

(d) A rescission of certain alleged compromise and settlement agreements;

(e) A cancellation of certain deeds and conveyances of real estate between the parties;

(f) A like cancellation of all acquittances, releases, or other documents involved in transactions between the parties;

(g) An accounting between the appellants and the appellee Friedman, as partners, of all rents and profits and proceeds of sales of land, and an accounting by appellants against the defendant Trust Company for its handling of fiduciary funds belonging to said partnership and for a discovery by both of the appellees of all appropriate documents relative to the properties of the partnership of Friedman, Singer and Neistadt and the rents and profits of all said properties and the proceeds of all sales thereof.

No opinion was rendered by Mr. Justice Bailey, who dismissed the bill of complaint of appellants, as amended, a mere order to that effect being passed November 25, 1935 (R. p. 26). From the signing of said order this appeal was prayed to this Court (R. p. 26). This cause being here on a final decree dismissing a bill of complaint all of the facts are taken as admitted.

The following is a comprehensive statement of the

FACTS.

1. Appellants and appellee Benjamin D. Friedman on April 2, 1928, entered into a certain partnership in the real estate and construction business in the District

of Columbia under the style and name of Friedman, Singer and Neistadt, which said partnership continued and existed to April 10th, 1931.

2. During the life of the partnership of Friedman, Singer and Neistadt, the appellee Munsey Trust Company became a trustee, depository and fiduciary financial agent for said partnership and each member thereof, being vested with the right by said partnership to hold partnership securities, to have custody of its valuable real estate holdings, and to collect and disburse the rents from the same, and to maintain said properties; that said appellee Trust Company further became the bankers of said partnership and loaned it money and received rents and profits and the proceeds of sales of and from the real estate holdings of said partnership and applied the same, according to its demands, to the payment of interest, curtailments and discharge of obligations of the partnership incurred from time to time, and generally counseled and advised said partnership as a fiscal agent and trustee.

3. That on or about January 1, 1931, and while acting as trustee and fiduciary agent of appellants and appellee Friedman there was placed in the possession of the appellee Trust Company, as such trustee, a cash fund of \$35,000, the proceeds of the sale of a certain second mortgage of \$50,000.00, secured on real estate at Sixth and Louisiana Avenue, Northwest, Washington, D. C.; at this time appellee Trust Company also had made loans upon the real estate holdings of appellants and appellee Friedman, as a partnership, having loaned \$45,000.00 on premises 1908, 1910 Fourteenth Street, and 1407, 1409, 1411 T Street, Northwest,

Washington, D. C., said property having a value of \$65,000.00, and having loaned \$45,000.00 upon premises located at Nichols Avenue and S Street, Southeast, which was of the value of \$100,000.00. Said trust company, while holding said loans, having charge of said properties, the management of the same, and the collection and disbursement of rents therefrom, was charged with the duty, at all times, of rendering regular accountings to appellants and appellee Friedman, as the said partnership of Friedman, Singer and Neistadt; that during said control of said properties said appellee Trust Company overcharged said partnership for its services and collected usury, and wrongful and unlawful commissions and profits from said partnership and failed to account for the same.

4. On, to-wit: January 19, 1931, in violation of its trust relationship to appellants and to said partnership of Friedman, Singer and Neistadt, of which appellants were the majority of the members, and in confederation and cooperation with appellee Friedman, said Trust Company undertook to foreclose the properties belonging to the partnership known as Lots 32 and 33 in Square 5601, under a first mortgage or deed of trust of \$75,000.00, owned by appellants and appellee Friedman, which had been placed with said Trust Company as collateral security for a loan of \$45,000.00 due said appellee Trust Company, and said Trust Company did so foreclose said property at public auction, by virtue of a fraudulent cooperation, confederation and conspiracy with appellee Friedman, and said appellee Trust Company sold said property to said Friedman and collected from him the sum of \$65,000.00, and

received the proceeds of said sale in its fiduciary relation, as fiscal agent and banker for appellants and said appellee Friedman as members of said partnership of Friedman, Singer and Neistadt, said sum, added to the sum of \$35,000.00 theretofore received in trust by appellee Trust Company, creating a trust fund in the hands of said Trust Company of \$100,000.00; that subsequently, still further acting as fiduciary agent for appellants, as members of said partnership of Friedman, Singer and Neistadt, but without the consent of appellants, said appellee Trust Company filed a bill in equity to collect a certain deficiency of \$18,172.42 against one Isador Young, which had occurred and resulted from the foreclosure of the properties of said Young under the \$75,000.00 mortgage just hereinabove mentioned, and that said trust company, in violation of its fiduciary duty to appellants, accepted \$7500.00 in full satisfaction of said deficiency, although said Isador Young was solvent and good for the whole sum, and so accepted said amount without the consent or approval of appellants, thereby becoming liable to appellants by reason of said wrongful and fraudulent conduct for the total sum of \$18,172.42, and interest thereon, and also became indebted to appellants, as members of said partnership, for sums wrongfully and unlawfully exacted in the way of unlawful and wrongful commissions and illegal charges of interest on account of loans and other transactions between said appellee Trust Company and said partnership.

5. That the books and records of the receipts and disbursements of all the real estate of said partnership, the proceeds of sale of mortgages thereon, the proceeds

from foreclosures and other receipts from said partnership funds held, handled and managed by the appellee Trust Company, were all in the possession of said appellee Trust Company and access thereto not given or furnished, but in fact denied appellants, and only given to appellee Friedman; that appellants were at all times kept ignorant of the correct condition of the affairs of said partnership and the standing of its account, by the withholding of the information possessed by appellee Trust Company and its co-appellee Friedman; that on or about March 1, 1931, appellants undertook to ascertain from appellees the condition of the trust estate held and managed by the appellee Trust Company in cooperation and confederation with its co-appellee Friedman, and through appellant Singer your appellants sought an interview with the President of said Trust Company, one C. H. Pope, and demanded of said President to be furnished with a full and complete accounting

“Of all of the affairs of said partnership and all of the funds and properties owned by said partnership in which your complainants (appellants) were owners of two-thirds thereof, and that said trustee, through its said President, failed and refused to give your complainant (appellant) Singer any of the information called for and requested by him.”

“That on or about the same date and without having obtained the information required for intelligent action your complainant Singer demanded to know the state of their accounts as partners and individuals with said defendant (appellee) Trust Company of the monies they had on hand to their credit, which information they were unable to obtain same being refused by said defendant (appellee)” (R. p. 6).

6. The bill of complaint further alleges, paragraph 7, Record p. 6, on information and belief, that the information called for was refused to appellants

“* * * because of an illegal, unlawful and fraudulent understanding by and between the defendants herein (appellees) in order that the defendant Friedman might thereafter gain preference, advantage and priority of interest in the joint assets and properties of said partnership, and frighten your complainants to dispose of their interest in said partnership at a price and cost far less than its real value.”

7. In furtherance of the above conspiracy to keep appellants in ignorance of their rights, of the value of their properties, the state of the accounts between themselves and their fiscal agent, appellee Trust Company, and although on April 5, 1931, appellee Trust Company had in its possession, belonging to said partnership, cash funds in excess of \$110,000.00,—information as to which was denied to appellants—and although said partnership at the same time owned valuable real estate equities worth about \$100,000.00, all of which was in the charge and custody of appellee Trust Company, that information as to such properties and assets were withheld, refused and denied appellants, and the appellees herein, in confederation one with the other, continued to threaten and frighten appellants with impending foreclosures and threats, in order to induce them, in ignorance of their rights, to accept a small fractional sum of what they were really entitled to for such rights. That while denying such information to appellants, said appellee Trust Company furnished all of such information to appellee Friedman in order to en-

able him, in furtherance of the conspiracy between appellees, to become possessed of all of the assets and properties of the partnership of Friedman, Singer and Neistadt, without paying for the same more than a fractional part of its value; that in furtherance of said cooperation and conspiracy between appellee Friedman and said appellee Trust Company, false and fraudulent information was communicated to appellants to the effect that unless they accepted the insignificant sum of \$8,000 for their two-thirds share of the assets of said partnership, worth more than \$100,000.00, and represented by \$110,000 in cash and valuable real estate equities, that they would get nothing; that this fear was augmented by denial to appellants of information demanded by them of the appellee Trust Company, through its President, C. H. Pope, and that being without records of the status of their properties and accounts, and being put in fear of a loss of everything by the false and fraudulent information communicated to them by appellee, and by the refusal to give them the information as to their accounts and assets of said partnership, as demanded, that they were fraudulently induced to execute Exhibit A (R. p. 12), an alleged release by them of the appellee Trust Company of its actual liability to them for an accounting of their assets and a distribution to them of two-thirds of the net thereof, and further fraudulently induced to execute Exhibit B (R. p. 13), a paper writing purporting to be a release of appellee Trust Company for its wrongful and fraudulent conduct and actions in depriving them of their two-thirds interest in the assets of said partnership, as hereinabove set out, for a consideration of

\$8,000.00, \$6,000.00 cash and \$2,000 in the form of a promissory note signed by appellee Friedman.

8. That the bill of complaint further sets out that by reason of the frauds and wrongful acts of the appellees in confederation and cooperation that appellants herein were induced on May 29, 1931, to execute and deliver to the appellee Friedman a deed conveying to him Lots 29 and 33 and part of Lot 32 in Square 205, and Lot 24 in Square 642 and Lot 85 in Square 190, said conveyances being induced by the wrongful and fraudulent information given appellants and refusal to give correct and full information as to the state of the finances of their said partnership, the cash on hand belonging to it, and the value of its equities, and the disposition of the rents and profits from its real estate, and of the proceeds of moneys received from the sale of its mortgage and real estate assets, and because of the inability of appellants to secure from appellees sufficient information upon which to intelligently act and information of such fraudulent character as to cause them to surrender, in ignorance, all of their rights and titles to said properties.

9. Said bill of complaint further shows that notwithstanding the fact that the appellee Trust Company held over \$110,000.00 in cash of the funds of appellants and their co-partner Friedman, and although there was due on their more valuable real estate first mortgages or trusts aggregating only \$90,000.00, and notwithstanding the fact that said properties were allowed to be foreclosed and lost to the partnership by the fraudulent cooperation, confederation and conspiracy of appellees and in the face of demands by appellants for

information as to the status of the properties of the partnership, the amount of money on hand from rents and profits, proceeds of sales of mortgages and of properties, all of which was denied appellants, resulting in a fraudulent foreclosure to their properties by reason of the true facts not being given them and the total extinguishment of all their rights through the execution of fraudulent releases upon false and fraudulent inducements recited in the bill of complaint, and likewise resulting in the execution of wrongful and fraudulent deeds to appellee Friedman because of the same false and fraudulent inducements and the wrongful and fraudulent concealment of the information to which appellants were entitled, and which they demanded and which was necessary for their intelligent action and decision thereon.

10. The bill of complaint shows that the wrongs and fraudulent acts resulting in the extinguishment of their partnership assets belonging to appellants, and the vesting of same in appellant Friedman, and the execution by appellants of the wrongful and fraudulent instruments as parts of the scheme of appellees, occurred from about April 1, 1931, to May 29, 1931.

11. This suit was instituted in this Court on July 12, 1935, to set aside and annul all of the instruments, agreements, deeds and conveyances of every character between the parties, resulting from the frauds and false information and fraudulent inducements, slightly more than four years from the occurrence of said events.

12. The bill of complaint, as amended, sets forth in detail the reasons existing and excuses, explains and justifies the delay by appellants in failing to bring suit at an earlier date, said reasons being that the fraudulent acts set forth in the bill of complaint, paragraphs 4 and 5 (R. pp. 3, 4 and 5), paragraph 6 (R. p. 5), paragraph 7 (R. pp. 5 and 6), paragraph 8 (R. pp. 6 and 7), and paragraph 9 (R. pp. 7 and 8), *were only discovered by appellants and made known to them in an intelligible manner a short time prior to their bringing suit, to-wit: about May 15, 1935* (paragraph 9-A, R. p. 21); that prior to said date the only information appellants had was of a nature to arouse suspicion and not to justify legal action or a suit in equity; that they used due diligence in following up the suspicion which existed in their minds by seeking counsel of Michael J. Colbert, a member of the Bar of the District of Columbia, on June 5, 1934, and had him investigate the merits of their suspicions; that he retained their papers and documents, upon which their suspicions of wrongdoing were founded until about May 15, 1935, without definite action thereon; that receiving no report or action from said counsel, and being unlearned in the law, and inexperienced in legal matters and principles, but still anxious to know their rights, appellants, on or about May 20, 1935, sought the advice and assistance of their present counsel and retained them

“to specifically trace the records and documents and other sources of information, of which complainants were possessed of only an indefinite and unsubstantial foundation, and run the same down and advise complainants as to whether or not they were entitled to bring a bill in equity against said

defendants for an accounting, discovery and re-scission'' (R. p. 21).

That as soon as they received a report of their said counsel they were instructed to bring this action.

13. The bill of complaint, as amended, further alleges and shows intimate relationships between appellees in that appellee Trust Company, while acting as fiduciary agent for the partnership of Friedman, Singer and Neistadt, and without the knowledge of appellants, entered into a private corporation with the appellee Friedman for the conduct of private business with said Friedman, said corporation being known and designated as The F. W. & P. Company, Inc., incorporated under the laws of the State of Delaware (R. p. 22).

14. To the bill of complaint as amended, as above analyzed and set forth, identical motions to dismiss were filed by the defendant-appellee Benjamin D. Friedman, and the defendant-appellee Munsey Trust Company (R. pp. 23, 24, 25 and 26), said motions to dismiss being based upon the following grounds:

1 and 2—No equity in the bill.

3—The rights asserted in the bill of complaint were settled by agreement prior to suit.

4—The allegations of the bill, taken as admitted, do not allege fraud in the procurement of the release.

5—Statute of Limitations.

6, 7, 8 and 9—Laches.

10—Failure to restore consideration paid appellants by appellee Friedman.

11—Estoppel by conduct.

Said identical motions to dismiss were granted by final decree dismissing appellant's bill as amended, filed November 15, 1935 (R. p. 26).

POINTS.

1 & 2. The Court erred in granting the motion to dismiss the Bill of Complaint for want of equity and laches.

The facts alleged in the Bill of Complaint are fully set out above and establish plaintiff's right to the equitable relief prayed for, on the following grounds:

(a) Because of fraud, concealment, misrepresentation and false inducements whereby plaintiffs were wrongfully forced to part with their properties worth over \$100,000.00 for \$8,000.00.

(b) Because of the necessity for an accounting and discovery in order that equity might be done—that such accounting is necessary in order that the facts as to the plaintiff's partnership interests in the firm of Friedman, Singer and Neistadt might be ascertained and the wrongful and fraudulent charges against plaintiffs' partnership interests might be determined from the books and records of the defendant Trust Company—those being the only books of account on said properties and their contents being fraudulently concealed from plaintiff, in face of demands therefor.

(c) Because one of the main allegations in the Bill of Complaint involves the rescission and cancellation of fraudulent contracts, releases and deeds affecting

real estate and involving the frauds and false inducements charged against defendants.

(d) Because of the allegations of the Bill of Complaint requiring the appointment of a receiver to recover, hold and conserve the properties, real and personal, described in the Bill of Complaint.

ARGUMENT.

Points Nos. 1 & 2.

Plaintiff's Bill of Complaint states a cause of action, in Equity, beyond serious question, and is supported by the overwhelming weight of authority in this Court, the United States Supreme Court, and generally. (See *Bradley v. Davidson*, 47 App. D. C. 283; *Pryor v. McIntire*, 7 App. D. C. 417, 173 U. S. 38.)

Without re-summarizing the facts stated in the Plaintiff's Bill, we desire to cite authorities, first from this Court, then by other supporting authorities. These cases, in the main, not only support the validity of our equitable rights, but negative and deny the position of defendant's that plaintiffs are barred of recovery either on account of laches or any applicable statute of limitation.

In the case at bar, plaintiffs filed their Bill of Complaint within about four years from the date of the wrongs and frauds committed, from which they now demand relief, about one year from their conference with Michael J. Colbert, attorney (R. p. 21), when they were merely confirmed in their previous "suspicions," and one month after their discovery of the real and

substantial frauds practiced upon them (R. p. 21). The frauds and acts of defendants in violation of equity were grave and were committed in secret when defendants as fiduciaries and trustees, owed plaintiffs every duty of frankness and honest dealing, which facts bring into play all the equitable principles applied in the cases hereinafter cited.

In the case of *Bradley v. Davidson*, in this Court found in 47 Appeals, D. C., pp. 283-284, laches and lack of equity were pleaded and that case is so nearly a parallel to the case at bar that we quote liberally from it, as follows:

“Nor do we find any greater merit in the defendants’ contention that plaintiff was guilty of laches. It is a familiar rule that the period of delay or neglect necessary to constitute laches varies with the peculiar circumstances of each case, and, unlike the Statute of Limitations, is not subject to an arbitrary rule. ‘It is an equitable defense, controlled by equitable considerations, and the lapse of time must be so great, and the relations of the defendant to the rights such, that it would be inequitable to permit the plaintiff to now assert them.’ *Halstead v. Grinnan*, 152 U. S. 412, 417, 38 L. ed. 495, 497, 14 Sup. Ct. Rep. 641. In *George v. Ford*, 36 App. D. C. 315, 333, this Court, speaking through Mr. Chief Justice Shepard, said: ‘So great is its abhorrence of fraud and the violation of Fiduciary obligations, that a court of equity will look with some indulgence upon mere delay, from which no material injury has resulted.’ See also *Lewis vs. Denison*, 2 App. D. C. 387, 391; *Baker v. Cummings*, 4 App. D. C. 230, 273; and *Ackerman v. McIntire*, 7 App. D. C. 443.

In the present case it is averred in the bill, as previously set forth, that some time after the foreclosure of the trusts upon the apartment Mrs. Bradley ‘became suspicious of the character of

said exchange and consulted her attorney in regard to the matter, and that, after an investigation of the same, plaintiff says that, upon information and belief, she recently *discovered* and therefore avers and charges upon information and belief' the facts upon which she asks for a decree. Under Rule 30 of the equity rules of the Supreme Court of the United States which of course are controlling in this jurisdiction, 'averments other than of value or amount of damage, if not denied, shall be deemed confessed.' It, therefore, was incumbent upon the defendants to make answer to the above averments of plaintiff's bill, and this they did not do. In other words, if the defendants were aware of any previous knowledge by Mrs. Bradley concerning the acceptance of double commissions by the Davidsons, it was their duty to say so in their answer. The Davidsons did not hesitate to make such an averment as to Mr. Bradley, whose lips were sealed, and their failure to include Mrs. Bradley certainly may not be attributed to oversight. It is clear that we must accept this averment as an admitted fact. The Davidsons and the owner of the apartment house, through Simpson and Sullivan, perpetrated a fraud upon Mr. Bradley and concealed the real evidence of the fraud. See *Faust v. Hosford*, 119 Iowa, 97, 100, 93 N. W. 58; *Jackson v. Pleasanton*, 95 Va. 654, 29 S. E. 680. Their concealment, therefore, amounted to a continuation of the original fraud. They made known the facts when, and when only, they were compelled to do so; and a court of equity would be forgetful of its true province should it rule that, in these circumstances, the plaintiff was guilty of laches. The defendants appear 'in an atmosphere so contaminated with secrecy and opportunity for unfair dealing, and so foreign to the properties of agency, that it shocks the refinements of equity.' *Rawlings v. Collins*, 36 App. D. C. 72, 78."

In the case of *Metzer v. Millegan*, 48 App. D. C. 156, the Court held (quoting from syllabus) that:

“An action to set aside a settlement agreement and a release of a deed of trust on the ground of fraud is not barred by laches, where it was brought within three years from the discovery by the plaintiff of the nature of the instruments executed by her.”

In this case *six years* elapsed after the release was executed before action was filed.

In the case of *Overholt v. Mathews*, 48 App. D. C. 482, the Court held (quoting from syllabus):

“A suit for fraud seasonably instituted, will not be dismissed because of a delay for ten years *in its prosecution where none of the parties thereto were in any way prejudiced by delay, and the applicant for the dismissal was as much responsible as the complainant for the delay* and during the delay acquiesced in an order enlarging the time for a step in the proceedings.” (Italics ours.)

“It is a familiar rule that courts of equity have jurisdiction to compel an accounting where as here fiduciary relations exist or discovery is sought.”

95 Mich. 185, and many others.

In this cause the relationship of all the parties were on a fiduciary basis, as partners and as trustees *cestui que trustent*, therefore the principles laid down by this Court in *Pryor v. McIntire*, 7 App. D. C. 417, strictly govern and rule this case. We quote from page 431, as follows:

“The testimony clearly shows that Edwin A. McIntire, not satisfied with the liberal fees and charges of the business, conceived the idea, early in his relations with complainant and with Jenison, of defrauding them. Taking advantage of

the trust relations and the confidence reposed in him by simple-minded people, he concocted his several schemes and carried them into execution through his false representations and personations and the spoliation of papers.

In such cases, where there are no intervening equities no elements of estoppel, and no inequitable conduct on the part of the injured parties themselves, is not a court of equity warranted in holding that nothing short of the statutory period of limitations in analogous cases at law, should bar the remedy? We think so, clearly, and believe that we are supported both by reason and authority."

The case of McIntire vs. Pryor, above quoted from was appealed from the Court of Appeals of the District of Columbia to the Supreme Court of the United States, and there affirmed October Term 1898. Opinion by Justice Brown, 173 U. S. 38.

In the opinion of the Supreme Court of the United States by Mr. Justice Brown, the opinion being by a unanimous Court, decided cases from the Supreme Court of the United States and leading cases from other jurisdictions were fully cited; in fact the decision of the Supreme Court constituted a complete review of the state of the law and has never been revised, modified or reversed, and therefore constitutes the law today. We quote at length from this decision, as follows:

"So, in *Prevost v. Gratz*, 6 Wheat, 481 (5:311), it was said by Mr. Justice Story: 'It is certainly true that length of time is no bar to a trust clearly established; and in a case where fraud is imputed and proved, length of time ought not, upon principles of eternal justice, to be admitted to

repel relief. On the contrary, it would seem that the length of time during which the fraud has been *successfully concealed and practiced is rather an aggravation of the offense, and calls more loudly upon a court of equity to grant ample and decisive relief.*" (Italics ours.)

"In Meador v. Norton, 11 Wall. 442 (20:184). *The fabricated character* of these papers being discovered, the grantee of the rights of the three sisters brought a suit in equity to have the defendant holding under the patent declared trustee of the legal title, and compel a transfer of that title to him. Held, that the suit, which was begun in 1865 would lie, and that laches could not prevail as a defense where the relief sought was granted on the ground of *secret fraud*, and it appeared that the suit was commenced a reasonable time after the *fraud was discovered.*" (Italics ours.)

"The case of Hammond v. Hopkins, 143 U. S. 224, (36:134), a leading case in this court is not to the contrary. In this case two partners owned *real estate in common, some of which was used in the partnership business.* One died, making the other by his will a trustee for the testator's children, with power of sale of all real estate, and directing that the business be continued. After carrying on the business for some time the trustee sold the real estate by auction, and bought portions of it through a third person, and accounted for half of the net proceeds. The transaction was open and known to all the *cestuis que trustent*, and was objected to by none of them. It was held that there was nothing in this to indicate fraud; that the purchase was not absolutely void, but voidable, and might be confirmed by the parties interested, either directly, or by long acquiescence, or by the absence of an election to avoid the conveyance within a reasonable time after the facts came to their knowledge. There was a delay of nearly twenty years in this case. In delivering the opin-

ion the Chief Justice said: 'Each case must necessarily be governed by its own circumstances, since, though the lapse of a few years may be *sufficient to defeat* the action in one case, a longer period may be held requisite in *another, dependent upon the situation of the parties, the extent of their knowledge or means of information, great changes in values, the want of probable grounds for the imputation of intentional fraud, the destruction of specific testimony, the absence of any reasonable impediment or hindrance to the assertion of the alleged rights, and the like.*' A bare statement of these facts will show that it has no application to the case now under consideration." (Italics ours.)

The opinion of Mr. Justice Brown in the case of McIntyre vs. Pryor then continued, as follows:

"We do not wish to be understood as holding that the plaintiff, even in a case of actual fraud, may wait an indefinite time, or always so long as the statute of limitations would permit him to bring an action at law before asserting his rights; but where the fraud is clearly proved the court will look with much more indulgence upon any disability under which the plaintiff may labor as excusing his delay. As was said in *Townsend v. Vanderwerker*, 160 U. S. 171, 186 (40:383, 388): 'The question of laches does not depend, as does the statute of limitation, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether, under all the circumstances of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did.'

The circumstances of this case are so peculiar; the fraud so glaring; the original and persistent intention of McIntire through so many years to make himself the owner of the property so manifest; the utter disregard shown of the rights of the plaintiff, as well as of Jenison, the mortgagee,

upon whose ignorance in the one case and whose confidence in the other he imposed so successfully; the false personation of Emma Taylor, and the fact that the decree in favor of the plaintiff can do no possible harm to any innocent person—demand of us an affirmance of the action of the Court of Appeals. Its decree is accordingly affirmed.”

The Defendants contend that the Bill of Complaint shows that Plaintiffs had some information about their rights and the alleged wrong of Defendants. The Bill only shows no knowledge to warrant or justify action. And this was true although Plaintiffs *demanded full* information. Plaintiffs were entitled to all the information the Defendants had as to the joint partnership properties. Being refused this, upon their demands, the Defendants were guilty of fraudulent concealment.

The Courts will not lightly seize upon some small circumstance to deny relief to a party plainly shown to have been actually defrauded, against those who defrauded him, on the ground that he did not discover the fact that he had been cheated as soon as he might have. 37 C. J. Sec. 309, Note,

Victor Oil Co. v. Drum, 184 Cal. 226, *It was the absolute obligation of the defendants to disclose all of the facts to the plaintiffs when they were called for and their refusal then and failure so to do makes them continuously liable for the wrongs herein complained of and stops the running of any rule of laches or statute of limitation.*

In the case of *Krohn v. Williamson*, 62 Fed. 869, where suit was brought a year after the discovery of fraud the Court held that it was not important that

suit should have been brought immediately, and said that even if the acts as stated were accurate, it was not a full disclosure. The Court further held that:

“Krohn might fairly have inferred that Nelson alluding only to reasonable and ordinary compensation for his services as attorney in the condemnation proceedings and for Williamson’s services in securing evidence for the same purpose. ‘We can be very certain that if Krohn had known the full truth (which was Nelson’s duty to tell him) Krohn would never have made settlement. It is quite true that *Krohn suspected* that he was not being fairly treated and that he *therefore insisted that he should be paid an additional amount in cash over and above that which Nelson’s statements of facts he was entitled to, but I do not see that Krohn’s suspicions of Nelson’s fair dealing and a settlement based on them, at all relieved Nelson of the duty to disclose everything. It did not put the parties at arms length.* The trust relation continued in existence so long as the proceeds of the transaction in which it had its inception remained undistributed. For these reasons Krohn is entitled to have the contract of settlement rescinded, he having tendered back that which he received under it.’” (Italics ours.)

The opinion in this cause was handed down by Judge Taft, afterwards Chief Justice.

The defense of laches on the ground that complainant, by inquiry might have learned the facts relied on, was relied upon in the Krohn case also, but the Court held this defense was not available to Defendants, who were under obligation to disclose to Complainants all the facts without requiring a demand, especially where the delay has worked no injury to them. This was held to be true because there existed the relation of Trustee

and *Cesti Que Trust*, or of agents and principal. Before any settlement could be made between them it was necessary for Nelson and Williamson to make full disclosure of what had been done by them as trustees. *Citing Parker v. Nickerson*, 112 Mass. 195, 8 Ch-Appals, 56; *Farnum v. Brooks*, 9 Pick. 212.

The case stated in Plaintiff's Bill is not barred by laches nor by analogy by any applicable statute of limitation.

Actual fraud being indubitably shown in Plaintiff's Bill a Court of Equity will not permit the right to relief to be destroyed by the defense of laches when the parties to the fraud may be reached without injury to innocent persons.

Before presenting authorities on the doctrine of Laches, or by analogy, the Statutes of Limitations applicable to the facts herein, we quote Section 341 of the Code of the District of Columbia:

"No action shall be brought for the recovery of lands, tenements, or hereditaments after *fifteen years* from the time the right to maintain such action shall have accrued; nor on any executor's or administrator's bond after five years from the time of the right of action accrued thereon, nor on any other bond or single bill, covenant, or other instrument under seal after *twelve years* after the accruing of the cause of action thereon, nor upon any simple contract, express or implied, or for the recovery of personal property or damages for its unlawful detention after three years from the time the right to maintain such action shall have accrued * * *" (Italics ours.)

A careful reading of the Bill of Complaint shows that if any statute of limitation could be held to apply

to this case it must necessarily be either the fifteen (15) and, or twelve (12) year statute and not the three (3) year statute pleaded by Defendants. But, in fact, neither applies since this suit was brought *almost immediately* after the discovery of the fraud complained of, and is, therefore, seasonably brought.

The three (3) year statute relates to simple contracts (not this case at all), the twelve (12) year statute relates to instruments under seal (as here) and the fifteen (15) year statute applies to lands, tenements and hereditaments (as here), hence there is no force to Defendants' plea of the three (3) year statute, and this is true even were it shown by the Bill *that Plaintiffs waited over three (3) years after discovery to file their suit.*

In a leading case on the question of laches (*Michoud v. Girod*, 4th How. 503) (11:1076), Mr. Justice Wayne in delivering the opinion of the Court said:

“in a case of actual fraud, Courts of Equity give relief after a long lapse of time * * * In general, length of time is no bar to a trust clearly established to have once existed; and where fraud is imputed and proved, length of time ought not to exclude relief. * * * There is no rule in equity which excludes the consideration of circumstances, and, in a case of actual fraud, we believe no case can be found in the books in which a Court of equity refused to give relief within the lifetime of either of the parties upon whom the fraud is proved, or within thirty years after it has discovered or becomes known to the party whose rights are affected by it.”

Also on this point we refer the Court to the following supporting authority:

Bailey v. Glover, 21 Wall. 342 and 347.

One of the grounds, point 3, stated in the appellees' motion to dismiss was on the theory that plaintiffs' rights asserted in their bill of complaint was settled by agreement prior to suit. There can be no weight given to this position asserted by appellees since this suit is based and grounded upon the allegations in the bill of complaint that the alleged settlement relied upon by appellees as a bar to this action was *fraudulently induced and obtained*; was part of a conspiracy and scheme to deprive appellants of their real estate and other properties, and the rights of appellants are established and maintainable under the great weight of precedents heretofore cited. It is, therefore, unnecessary to reproduce or re-argue the propositions covered under the general proposition that the bill of complaint herein states a good cause of action.

Point or position No. 4 taken by appellees in their motion to dismiss is that appellants do not allege fraud in the procurement of a release sought to be set aside by the bill of complaint. We have already covered this proposition in our statement of facts and the authorities supporting our contentions. Also the argument made under Point No. 3 just preceding covers with equal force and propriety the contention of appellees that no fraud inhered in the procurement of the release under attack. The bill of complaint alleges and embraces in categorical terms that the lease was obtained by fraud, by conspiracy between the defendants and by wrongful and false inducements and concealment by defendants while they were acting as fiduciaries and trustees of and for plaintiffs.

We have already discussed the non-applicability of the statutes of limitations and particularly the *three* year statute. As is stated in the statute of limitations itself, in the Code, quoted above—the *three* year statute pleaded by appellees relates only to *simple contracts*. The transactions under attack in appellants' bill of complaint relate to trusts involving real estate rights, leases upon real estate, fraudulent deeds obtained for conveyance of real estate and a general accounting against defendants for wrongful and fraudulent management of the real properties and the rents and profits therefrom belonging to plaintiffs.

If any statute of limitations should be held to apply it would necessarily be either the statute relating to real estate and interests therein or to instruments under seal. As has already been argued, and shown, such statutes do not apply, because the maximum time used or the maximum delay allowed in the bringing of this action was only about four years from the acts of fraud and only about *one month* from their *discovery*.

Appellees also plead as grounds 6, 7, 8 and 9 for the granting of their motion to dismiss that appellants were guilty of laches. This question has been fully covered in our argument under points 1 and 2.

10. There remains to be considered the contention by the appellees that failure to restore the consideration paid to appellants by appellees, when that certain agreement of release between the parties was executed, bars appellants from recovery. Modern equity decisions do not require a tender of a return of the consideration paid as a part of a fraudulent conspiracy against injured and wronged litigants. Modern deci-

sions show that when such frauds are consummated that usually those wronged spend the small pittance obtained from the tort-feasors before they discover the fraud and when they have discovered the fraud their only duty is to permit the court to pass such decree as equity demands between the parties. Equity will not place upon the wronged impossible conditions before they can apply to the Court for their remedy. In support of this proposition, we cite the following cases:

C. J. page 622, Vol. 13, note 68.

Winter v. Kansas City Cable R. Co., 73 Mo. A. 173.

“Where a portion of the consideration received on settlement was not paid back when it was sought to rescind the settlement, and the Court said: ‘It is not the law that a party who has been induced by the fraud of the other party, to release his right of action against the latter, must restore the consideration which he has received for the giving of the release, in order to be entitled to set up the fraud in avoidance of the release in an action upon the cause of action thus released.’”

Staiger v. Klitz, 136 App. Div. 874, 122 N. Y. S. 107.

“Where co-partners agreed that an account should be taken to determine the respective amounts to which they were entitled to, and plaintiff accepted the results of the accounting by his co-partners, which fraudulently concealed firm assets so as to show that he was entitled to some twelve thousand dollars less than his share, plaintiff need not offer to restore the amount he received under the accounting in an equitable action to rescind the settlement contract.”

DeBow v. Wollenberg, 52 Or. 404.

“Where parties are seeking to set aside deeds and a bill of sale on the grounds of fraud were entitled

to the money received in part payment on account of their right to a distributive share in an estate, and defendants could at most only claim that the money had been prematurely advanced to such parties, the failure to return the money did not defeat the right to maintain the action."

"In the *Restatement of Contracts*, Sec. 480 (2), under the heading of 'When offer to restore performance is a condition of the power to avoid,' we read, 'A failure to return or offer to return performance received in accordance with the rule stated in subsection (1) is merely money paid, the amount of which can be credited in partial cancellation of the injured party's claim.' And in par. 481 we read, 'Where specific restitution is allowable, an offer to restore what has been received by the injured party, is not a condition of the right to a decree. The decree of the Court will impose such condition on the defendant's duty of restitution with reference to the return of performance or its value as justice requires, and if these conditions are not complied with the plaintiff cannot obtain restitution.' "

11. Estoppel by conduct is the last defense of appellees in support of their motion to dismiss. No conduct or act of appellants in this case can possibly work an estoppel under equitable principles. Such estoppel would only be effective against appellees providing innocent parties had suffered and their rights injuriously affected. In this case all of the parties guilty of the frauds charged *are in Court under process*, admitting the allegations of the Bill of Complaint by their motions to dismiss. The Bill of Complaint recited no conduct of plaintiffs which could be construed, in equity, as prejudicial to the rights of either defendant.

Taking the Bill of Complaint at its face, as must be done on a motion to dismiss, every act of appellants has been strictly ethical, and without prejudice to any right of any innocent party or even of the guilty defendants, therefore the principle of estoppel in no way arises.

On this subject Mr. Justice Wendell Phillips Stafford, in his book, "A Hand Book of Equity," page 338, says:

"What, it may be asked, is the law in a case where a party obtains a contract merely by keeping silent about material matters well known to him? The answer depends upon the question whether he was *under any duty to disclose them*. Generally speaking he is not for the parties deal at arm's length and each must look out for himself. But exceptions are found in the case of certain contracts, insurance for example, where reliance must necessarily be placed upon the party to make a full disclosure, *and contracts where the confidential relation between the parties demands* the utmost good faith, as between partners, or principal and agent. But one is not 'merely keeping silent' if he takes any step to hinder the other party from informing himself, nor if, undertaking to disclose, he makes only a partial disclosure which in its total effect is misleading, for it is a common and true saying that a half truth is often the most dangerous of lies. *Aarons Reefs v. Twiss*, 1896, App. Cas. 273, 281. It is a fraud for a seller not to disclose a latent defect of which he is aware and of which he knows that the purchaser must be ignorant. *Williston on Sales*, sec. 631. A landlord is liable for concealing from his prospective tenant a defect in the premises which makes them dangerous. *Cutler v. Hamlin*, 147 Mass. 471, 18 N. E. 397; we are speaking here of fraud which will entitle the victim to affirmative relief, and not merely of those instances of unfairness which we

have already seen will constitute a good defense to a bill for specific performance.”

Also on page 336 we find the following from Mr. Justice Stafford's book:

“It may be *that no restoration* or its equivalent is practicable and he must content himself with damages, but the remedies devised by equity are many and flexible and if the court can do full justice to both parties on the basis of a rescission it will do so, and if not, can as a last resource transfer the case to a law court. He should, and some courts hold that he must, act promptly. *Poor v. Woodburn*, 25 Vt. 234, but the better rule, it is believed is that his failure to do so will not bar him from relief by rescission unless the delay has led to some change in the defendant's position that makes rescission inequitable. *Brown v. Young*, 62 Ind. App. 364, 110 N. E. 562.”

On the question of estoppel we further quote from Vol. 10 Ruling Case Law, page 689:

“The following, however, may be ventured as the sum of all cases: *That a person is held to a representation made or a position assumed, where otherwise inequitable consequences would result to another* who, having the right to do so under all the circumstances of the case, has, in good faith, relied thereon. *Such estoppel* is founded on morality and justice, and especially concerns conscience and equity. On the one hand, it needs neither a consideration nor a legal obligation to support it. On the other hand, it is available only in defense of a legal or equitable right or claim made in good faith and can never be asserted to uphold crime, fraud, or wrong of any character, and the acts, claims, or conduct relied on to estop must be plainly inconsistent with the right afterwards set up. So usually, a person is not estopped by representations or acts induced by fraud.”

In view of the overwhelming array of authorities above set out, showing conclusively that the appellees' contentions relative to there being no equity in the bill, and that the claim herein set out is barred by laches, are unsound, it follows necessarily that the decree sustaining the motions to dismiss should be overruled.

Respectfully submitted,

ROBERT H. McNEILL,
GEORGE H. McNEILL,
SAMUEL LEBOWITZ,
Attorneys for Appellants.

TRANSCRIPT OF RECORD

United States Court of Appeals for the District of Columbia

JANUARY TERM, 1936

No. 6623

GEORGE BLANKS, PLAINTIFF IN ERROR,

vs.

MELVIN C. HAZEN, GEORGE E. ALLEN, AND DAN-
IEL I. SULTAN, CONSTITUTING THE BOARD OF
COMMISSIONERS OF THE DISTRICT OF COLUM-
BIA.

IN ERROR TO THE MUNICIPAL COURT OF THE DISTRICT OF
COLUMBIA.

FILED JANUARY 14, 1936.

PRINTED MARCH 9, 1936.

United States Court of Appeals for the District of Columbia

JANUARY TERM, 1936

No. 6623

GEORGE BLANKS, PLAINTIFF IN ERROR,

vs.

MELVIN C. HAZEN, GEORGE E. ALLEN, AND DAN-
IEL I. SULTAN, CONSTITUTING THE BOARD OF
COMMISSIONERS OF THE DISTRICT OF COLUM-
BIA, DEFENDANTS IN ERROR.

IN ERROR TO THE MUNICIPAL COURT OF THE DISTRICT OF
COLUMBIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 3, 1936.

United States Court of Appeals for the District of Columbia

No. 6623.

GEORGE BLANKS, Plaintiff in Error,

vs.

MELVIN C. HAZEN, GEORGE E. ALLEN and DANIEL I. SULTAN,
Constituting the Board of Commissioners of the District
of Columbia.

1 Municipal Court of the District of Columbia.

No. 305630.

GEORGE BLANKS, Plaintiff,

vs.

MELVIN C. HAZEN, GEORGE E. ALLEN and DANIEL I. SULTAN,
Constituting the Board of Commissioners of the District
of Columbia, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Municipal Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to-wit:

2 *Second Amended Declaration.*

Filed May 29, 1935.

The plaintiff sues the defendants for this to-wit:

That from November 1, 1932 to October 31, 1934 the plaintiff was operating a rooming house at 16 Third Street, S. E., Washington, D. C., for the operation of which there is no license tax or other tax required by the act of Congress,

D. C. Code, Title 20, Section 1729, being the Act of July 1, 1932, which is made applicable only to apartment houses, as the said premises consists of three stories and basement and no part of the basement has ever been used for living purposes or rented. The three other floors were rented as follows during the *said two years*:

On the first floor one room was rented to one tenant; one room to one tenant; and one room, a small dark trunk room without a window and a kitchen were rented to one tenant. There was one public bath; no private bath.

On the second floor there were five rooms and each of the five rooms was rented to a separate tenant, making five tenants. There were two public baths. No private bath. In about December, 1934 the plaintiff's daughter, who was managing the house for him, took two rooms on the second floor but sometimes she rents one of those out.

On the third floor there were three separate rooms, each of which was rented to one tenant, making three tenants. There is no bath on this floor.

The plaintiff furnished the light, water, gas, furniture and linen in these premises and in the other two premises mentioned hereinafter, but does not furnish meals in any of the premises.

3 In most of the rooms the tenant is a man or two men, or a woman or two women and in some few cases, a man and wife. The rooms are rented by the week, payable by the week.

These premises and similar ones in Washington are listed in the diversified Classified Section of the Telephone Company's Directory as "Rooming Houses" and are so recognized by the general public, and apartment houses are listed under a different classification as "Apartment Houses" in the Classified Section of the said Telephone Company's Directory.

That in April, 1933, the defendant, contending that the said statute was applicable to rooming houses generally and to the plaintiff's rooming house described above, demanded that he pay the license tax of \$15.00 under said Section 1729 for the premises 16 Third Street, S. E.

Whereupon the plaintiff protested same and refused to pay same and then the defendant notified the plaintiff that he would be arrested and criminally prosecuted unless he paid the said \$15.00 license tax. Thereupon, the said plaintiff, because of such duress and threat of criminal

prosecution and immediate arrest and in order to prevent his being arrested, did, still protesting such payment, make the payment of the said \$15.00 license tax on April 19, 1933 to the defendant; that the defendant illegally, erroneously, unlawfully, and without authority at law, through such duress and threats, exacted the payment of the said \$15.00 license tax of the said year from November 1, 1932 to October 31, 1933 on said premises from the plaintiff, which said payment was and is erroneous, illegal, unlawful and
4 without authority at law, and the plaintiff is entitled to a refund of same and to recover the same from the defendant with interest from April 19, 1933.

Thereafter the said plaintiff personally made demand on the defendant to refund the said \$15.00 and interest from April 19, 1933 and the plaintiff again through his authorized attorney made written demand on the defendant November 8, 1934 and at other times, for the refund of the said \$15.00 with interest from April 19, 1933; the said defendant in writing on November 30, 1934 refused to refund the said \$15.00 and interest.

That earlier in the year 1934, to-wit, on or about May 3, 1934, the defendant had the plaintiff summoned to the Corporation Counsel's office in the Police Court "to show cause why a warrant should not issue for your failure to secure an apartment house license as required by law" for 16 Third Street, S. E., and likewise summoned the plaintiff to the Corporation Counsel's Office for the same purpose as to premises 14 Third Street S. E., and 313 East Capitol Street. The said plaintiff in compliance with the said summonses gave the Corporation Counsel the facts set out above as to the premises 16 Third Street, S. E. and thereupon the Corporation Counsel refused to issue an information against the plaintiff to be presented to the Court to punish him for not securing the said license for the said premises for the license year from November 1, 1933 to October 31, 1934.

The Plaintiff also gave the Corporation Counsel the following data for said license year November 1, 1933 to October 31, 1934 as to premises 14 Third Street,
5 S. E., which plaintiff conducted as a rooming house that year: basement—one big room rented for \$5.00 with the use of a bath back of the boiler room, the same having been a servant's room when the house was formerly

used as a residence; first floor—one room with an arch into part of the hall that was cut off for a kitchenette, rented to one tenant; two rooms and use of the back hall as a kitchenette, rented to one tenant; no bath on first floor: second floor—one room and kitchen to one tenant; one room with permission to cook in the hall that leads to the public bath to one tenant; one room to one tenant; third floor—one room and kitchenette and public bath to one tenant.

Thereupon the Corporation Counsel, on behalf of the defendant, swore out an information against the plaintiff to the Police Court for failure to obtain a license under the said statute for the said premises 14 Third Street, S. E. for the said license year from November 1, 1933 to October 31, 1934, which went to trial and on the trial thereof the Court decided, held, found and determined as a matter of law and fact that the said premises 14 Third Street, S. E., was a rooming house and not an apartment house as defined by the statute and that the statute was not applicable thereto and that the defendant had no authority at law to assess a license tax against the said premises 14 Third Street, S. E.

The plaintiff also gave information for said license year November 1, 1933 to October 31, 1934 to the Corporation Counsel as to premises 313 East Capitol Street which plaintiff conducted as a rooming house that year as follows: basement—one big room with six feet high partition cutting off a cubbyhole for a kitchenette to one tenant; one room and kitchenette to one tenant; first floor—three
6 rooms which were occupied by the plaintiff, who was the owner (sometime thereafter the plaintiff moved out of the said three rooms and rented each of the three rooms to a separate tenant, one room to each tenant; second floor—this floor contained three rooms, but at the time they were all vacant. A little later in 1934 each of the three rooms was rented to a separate tenant, one room to each tenant and such is the condition now; there is a public bath; third floor—one room to one tenant; one room rented to one tenant; one room rented to one tenant; one room rented to one tenant, being four tenants and four rooms with a public bath.

Thereupon the Corporation Counsel swore out an information for the defendant against the plaintiff seeking to have the Police Court fine or imprison him for failure to

take out a license for the premises 313 East Capitol Street for the license year November 1, 1933 to October 31, 1934 and upon the trial thereof at the same time as the trial of the information of the premises 14 Third Street, S. E., the Court made the same decision, finding, determination and judgment as alleged above as to 14 Third Street, S. E., both of the said decisions being made after all the evidence and argument and filing of briefs which the Court took under advisement. The Court, through Hon. Gus A. Schuldt, one of the judges thereof, decided, held, found and determined as a matter of law and fact that the said Section 1729 does not apply to the commonly termed rooming house but only applied to apartment houses and that the plaintiff herein, the defendant in that Court, was not liable for such tax and dismissed the informations or warrants, which said judgments are binding and conclusive on the defendants herein as the conditions in 1932 and 1933 were the same as in 1934.

7 Wherefore, the plaintiff brings this suit and claims \$15.00 with interest from the 19th day of April, 1933, besides costs.

(Signed)

“

RAYMOND M. HUDSON,

MINOR HUDSON,

1343 H Street N. W.,

Washington, D. C.,

Attorneys for Plaintiff.

Bill of Particulars.

Filed May 29, 1935.

To amount of apartment house license tax paid for license year from November 1, 1932 to October 31, 1933, under protest for which payment there was no warrant of law \$15.00 Interest is claimed from the 19th day of April, 1933.

(Signed)

“

RAYMOND M. HUDSON,

MINOR HUDSON,

Attorneys for plaintiff.

8

Plea.

Filed April 16, 1935.

Now comes the defendant, the Board of Commissioners of the District of Columbia, by its attorneys, and for a plea to the declaration filed herein denies that in 1933 plaintiff

was operating a rooming house at 16 Third Street, S. E., or that it illegally or unlawfully contended that the District of Columbia Code, Title 20, Section 1729, was applicable to rooming houses or tenements, or that in 1933 the plaintiff was operating a building, premises No. 16 Third Street, S. E., for which an apartment house license was not required, or that it unlawfully threatened plaintiff with criminal prosecution unless plaintiff paid an apartment house license fee of \$15 for said building, but on the contrary defendant says that plaintiff was the owner or manager of an apartment house at 16 Third Street, S. E., and was required to pay to the defendant the license fee therefor required by the License Act of Congress Approved July 1, 1932, relating to apartment houses, and that plaintiff without duress, voluntarily, and without protest, on the 19th day of April, 1933, paid to the defendant a license fee of \$15 as the owner or manager of a building located at 16 Third Street, S. E., wherein the rooms were occupied in suites by three or more families, as provided for in the Act of Congress, approved July 1, 1932, known as the License Law of the District of Columbia, which provides a criminal penalty for any owner or manager of an apartment who fails to pay a license fee of \$15 per annum, Paragraph 39 of which defines an apartment house as

“a building in which the rooms are occupied in suites by three or more families”.

Defendant admits that in 1934 it filed an information in Police Court against plaintiff charging a violation of the said License Act of Congress in that he was the owner or manager of a similar building at 313 East Capitol Street,

9 S. E., in which the rooms were occupied in suites by three or more families, and had failed to pay the annual apartment house license fee therefor: defendant admits that said case came on for hearing before Gus A. Schuldt, one of the Judges of the Police Court, and that after evidence and argument said charge was dismissed by him and a judgment of not guilty entered therein; but defendant denies that said judgment decided and determined as a matter of law and fact that the provision of the said License Act of Congress did not apply to buildings occupied by three families living therein, as tenants in

suites of rooms, as well as by other tenants living in six single rooms, as was the case of premises 313 East Capitol Street, S. E., wherein there existed three apartments occupied in suites by families and six rooms occupied by tenants as single rooms in a three story and basement building, but defendant says that said judgment of not guilty was rendered as a finding that the particular charge in that particular case had not been supported by the evidence adduced therein by the defendant beyond a reasonable doubt; and defendant denies there has been any Police Court judgment in 1934 in respect to premises 16 Third Street, S. E., or that any such judgment as to premises 313 East Capitol Street, S. E., is binding on defendant as to conditions in 1933; or that defendant is indebted to plaintiff in the sum of \$15 and interest thereon.

(Signed) E. BARRETT PRETTYMAN,
“ VERNON E. WEST,
“ EDWARD W. THOMAS,
Attorneys for Defendant,
District Building.

10

Finding of Fact.

Mins. 94, p. 43, August 10, 1935.

Come now the parties hereto, and this cause being heard and submitted, the court finds in favor of the defendants.

Final Judgment.

Mins. 94, p. 50, August 16, 1935.

It appearing under Rule of Court that judgment on the finding in the above entitled cause should be entered, it is so ordered. Wherefore it is considered that the plaintiff take nothing by this action, that the defendants go hence without day, be for nothing held and recover of plaintiff their costs of defense.

11 In the Municipal Court of the District of Columbia.

No. 305-630.

GEORGE BLANKS, Plaintiff,

vs.

MELVIN C. HAZEN, GEORGE E. ALLEN, DANIEL I. SULTAN,
Constituting the Board of Commissioners of the District
of Columbia, Defendants.

Bill of Exceptions.

Be it remembered that the above entitled cause came on for hearing before Hon. George C. Aukam, one of the judges of this Court on the 10th day of August, 1935. Raymond M. Hudson, Esq. and Minor Hudson, Esq. appeared for the plaintiff and Edward H. Thomas, Esq., Assistant Corporation Counsel appeared for the defendants.

Thereupon the plaintiff to sustain the issue on his part after being first duly sworn, testified that the facts stated in the second amended declaration were true and correct, to which the defendants objected, which objection was sustained, and the plaintiff excepted, which exception was allowed. Witness testified he paid a license tax under the Act of July 1, 1932, Code Title 20, Section 1729 for the year from November 1, 1932 to October 21, 1933 on the premises 16 Third Street, S. E., Washington, D. C. under protest and the officer having told him if he did not pay it, he would be arrested.

Witness further testified that he verbally and in writing made demand for the refund of the said tax and the defendants in writing refused to make the refund.

Witness testified that the premises consisted of three stories and basement and no part of the basement was ever used for living purposes. On the first floor one room was rented to one tenant; one room to one tenant; and one room, and a kitchen were rented to one tenant, a man and wife. There was one public bath, no private bath.

On cross examination the witness testified as to the first floor that a young man paid the rent for two adjoining rooms, one for his mother and one for his aunt, and each room had cooking facilities but neither did any cooking.

Witness further testified that on the second floor there were five rooms and each of the five rooms was rented to a separate tenant, making five tenants. There were two public baths. No private bath. In about December, 1934 the plaintiff's daughter, who was managing the house for him, took two rooms on the second but sometimes she rents one of those out.

On the third floor there were three rooms. There is no bath on this floor. Two rooms were rented to a man, wife and child, with cooking facilities, there is a front and back entrance to the building which tenants can use.

12 The plaintiff furnished the light, water, gas, furniture and linen in these premises and in the other two premises mentioned hereinafter, but does not furnish meals in any of the premises.

In most of the rooms the tenant is a man or two men, or a woman or two women and in some few cases, a man and wife. The rooms are rented by the week, payable by the week.

The witness was asked if these premises and similar ones in Washington are listed in the diversified Classified Section of the Telephone Company's Directory as "*Rooming Houses*" and are so recognized by the general public, and apartment houses are listed under a different classification as "*Apartment Houses*" in the Classified Section of the said Telephone Company's Directory, to which the defendants objected, which objection was sustained and the plaintiff excepted, which exception was allowed. Thereupon, counsel for the plaintiff stated that the answer to the question would be "yes."

The plaintiff then offered the telephone directory in evidence to prove the same, but the defendant objected, which objection was sustained and the plaintiff excepted, which exception was allowed.

The witness was asked if on or about May 3, 1934 the defendants had the plaintiff summoned to the Corporation Counsel's office in the Police Court "to show cause why a warrant should not issue for your failure to secure an apartment house license as required by law" for 16 Third Street, S. E., and likewise summoned the plaintiff to the Corporation Counsel's office for the same purpose as to the premises 14 Third Street, S. E., and 313 East Capitol Street, and the said plaintiff in compliance with the

said summonses gave the Corporation Counsel the facts set out above as to the premises 16 Third Street, S. E., and thereupon the Corporation Counsel refused to issue an information against the plaintiff to be presented to the Court to punish him for not securing the said license for the said premises for the license year from November 1, 1933 to November 1, 1934, to which the defendants objected, which objection was sustained and the plaintiff excepted, which exception was allowed. Thereupon, counsel for the plaintiff stated that the answer to the question would be "yes."

The witness was also asked if the plaintiff also gave the Corporation Counsel the following data for said license year November 1, 1933 to October 31, 1934 as to premises 14 Third Street, S. E., which plaintiff conducted as a rooming house that year: basement—one big room rented for \$5.00 with the use of a bath back of the boiler room, the same having been a servant's room when the house was formerly used as a residence; first floor—one room with an arch into part of the hall that was cut off for a kitchenette, rented to one tenant; two rooms and use of the back hall as a kitchenette, rented to one tenant; no bath on the first floor; second floor—one room and kitchen to one tenant; one room with permission to cook in the hall that leads to the public bath to one tenant; one room to one tenant; third floor—one room and kitchenette and public bath to one tenant to which the defendants objected, which objection was sustained and the plaintiff excepted, which exception was allowed. Thereupon, counsel for the plaintiff stated that the answer to the question would be "yes."

13 The witness was asked if thereupon the Corporation Counsel, on behalf of the defendants, swore out an information against the plaintiff to the Police Court for failure to obtain a license under the said statute for the said premises 14 Third Street, S. E., for the said license year from November 1, 1933 to October 31, 1934, which went to trial and on the trial thereof the Court decided, held, found and determined as a matter of law and fact that the said premises 14 Third Street, S. E., was a rooming house and not an apartment house as defined by the statute and that the statute was not applicable thereto and that the defendant had no authority at law to assess a

license tax against the said premises 14 Third Street, S. E., to which the defendants objected, which objection was sustained and the plaintiff excepted, which exception was allowed. Thereupon, counsel for the plaintiff stated that the answer to the question would be "yes."

The witness was asked if the plaintiff also gave information for said license year November 1, 1933 to October 31, 1934 to the Corporation Counsel as to the premises 313 East Capitol Street which plaintiff conducted as a rooming house that year as follows: basement—one big room with a six feet high partition cutting off a cubby-hole for a kitchenette to one tenant; one room and kitchenette to one tenant; first floor—three rooms which were occupied by the plaintiff who was the owner (sometime thereafter the plaintiff moved out of the said three rooms and rented each of the three rooms to a separate tenant, one room to each tenant; second floor—this floor contained three rooms, but at the time they were all vacant and a little later in 1934 each of the three rooms was rented to a separate tenant, one room to each tenant and such is the condition now; there is a public bath; third floor—one room to one tenant; one room rented to one tenant; one room rented to one tenant; one room rented to one tenant; being four tenants and four rooms with a public bath, to which the defendant objected, which objection was sustained, and the plaintiff excepted, which exception was allowed. Thereupon, counsel for the plaintiff stated that the answer to the question would be "yes."

The witness was asked if thereupon the Corporation Counsel swore out an information for the defendant against the plaintiff seeking to have the Police Court fine or imprison him for failure to take out a license for the premises 313 East Capitol Street for the license year November 1, 1933 to October 31, 1934 and upon the trial thereof at the same time as the trial of the information of the premises 14 Third Street, S. E., the Court made the same decision, finding determination and judgment as alleged above as to 14 Third Street, S. E., both of the said decisions being made after all the evidence and argument and filing of briefs which the court took under advisement. The Court, through Hon. Gus A. Schuldt, one of the judges thereof, decided, held, found and determined as a matter of law and fact that the said Section 1729 does not apply to the commonly termed rooming house but only applies

to apartment houses and that the plaintiff herein, the defendant in that Court, was not liable for such tax and dismissed the informations or warrants, which said judgments are binding and conclusive on the defendants herein as the conditions in 1932 and 1933 were the same as in 1934, to which the defendant objected, which objection was sustained, and the plaintiff excepted, which exception was allowed. Thereupon, counsel for the plaintiff stated that the answer to the question would be "yes."

14 The witness testified that the premises involved were in the thickly settled section of the city inhabited by very poor people and ones who could only afford one room and that many of the tenants were on relief.

Thereupon the plaintiff rested and the defendants moved for a directed verdict and the case was submitted and thereafter on August 10, 1935 the Court entered a finding of fact in favor of the defendants, to which the plaintiff excepted, which exception was allowed.

Thereafter on August 16, 1935 the Court entered judgment in favor of the defendant against the plaintiff to which judgment and ruling of the Court the plaintiff excepted, which exception was allowed.

And thereupon, and as all of said exceptions were duly noted and allowed as aforesaid and duly entered upon the minutes of the Court, before the jury retired to consider its verdict, and because the matters and things hereinbefore recited are not matters of record, in order to make the same a part of the record herein, which is hereby ordered, so that the plaintiff may have his case reviewed on appeal, the plaintiff, by his attorney, moves the court to sign and seal this, his Bill of Exceptions, to have the same force and effect as if each and every one of said exceptions had been separately signed and sealed, which motion is granted by the Court; and thereupon the plaintiff tenders this, his Bill of Exceptions, and requests the court to sign and seal the same, which is accordingly done, now for then, this 20th day of December, 1935.

G. C. AUKAM,
Judge.

Agreed to:

RAYMOND M. HUDSON.

Attorney for Plaintiff.

EDWARD H. THOMAS,

Attorney for Defendant.

[Endorsed:] 305630. George Blanks vs. Melvin C. Hazen et al. Bill of Exceptions. Filed Dec. 21, 1935, Municipal Court, District of Columbia.

15

Assignments of Error.

Filed December 23, 1935.

Now comes the plaintiff and makes and files the following assignments of error on the writ of error to the United States Court of Appeals for the District of Columbia:

1. The Court erred in holding that the District of Columbia Code Title 20, Section 1729 imposes a license tax on what are commonly known as rooming houses.

2. The Court erred in holding that where there is a rooming house usually rented one room to one tenant with cooking facilities in each room and in some instances, two rooms to a tenant, that such two rooms constitute a suite as defined by the Statute.

3. The Court erred in making a finding of fact and entering judgment for the defendant.

4. The Court erred in refusing to permit the plaintiff to state "that the facts stated in the second amended declaration were true and correct."

5. The Court erred in refusing to permit the plaintiff to testify as to the listing of the "rooming houses" in the telephone directory and in refusing to permit the telephone directory to be offered in evidence.

6. The Court erred in refusing to permit the plaintiff to testify as to the information against him in the Police Court as to 16 Third Street, S. E.

7. The Court erred in refusing to permit the plaintiff to testify as to the statements made to the Corporation Counsel and his action thereon.

16 8. The Court erred in refusing to permit the plaintiff to testify that an information was sworn out against him in the Police Court by the defendant for his failure to obtain a license for 14 Third Street, S. E.

9. The Court erred in refusing to permit the plaintiff to testify as to the information given by him to the Corporation Counsel and his action thereon as to premises 313 E. Capitol Street.

10. The Court erred in refusing to permit the plaintiff to testify that the Police Court held and determined that Sec-

tion 1729 of Title 20 of the Code did not apply to the plaintiff's premises.

11. The Court erred in holding that the construction of the Police Court of this statute in a direct proceeding between the plaintiff and defendant is not *res judicata* and binding on the Court and an estoppel to the defendant.

(Signed)

“

“

RAYMOND M. HUDSON,

MINOR HUDSON,

GEOFFREY CREYKE, JR.,

Attorneys for Plaintiff.

Designation of the Record.

Filed December 23, 1935.

Now comes the plaintiff and makes and files the following designation of the documents to be copied by the Clerk into the transcript on the writ of error to the United States Court of Appeals for the District of Columbia:

1. The second amended declaration and bill of particulars.

2. Pleas of the defendants.

3. Finding of fact.

17 4. Final judgment.

5. Bill of exceptions.

6. Assignments of error.

7. This designation of the record.

(Signed)

RAYMOND M. HUDSON,

MINOR HUDSON,

GEOFFREY CREYKE, JR.,

Attorneys for Plaintiff.

18 [Stamp:] Filed Nov. 11, 1935, Municipal Court, District of Columbia.

UNITED STATES OF AMERICA, ss:

The President of the United States, to the Honorable George C. Aukam, Judge of the Municipal Court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Municipal Court, before you, between George Blanks, Plain-

tiff, and Melvin C. Hazen, George E. Allen, Daniel I. Sultan, Constituting the Board of Commissioners of the District of Columbia, Defendants, No. 305,630, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Court of Appeals for the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 20 days from the settling of the bill of exceptions, or within such additional time after the expiration of the 20 days as the court below or a judge thereof for sufficient cause shall allow; that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable George E. Martin, Chief Justice of the said Court of Appeals, the 9th day of November, in the year of our Lord one thousand nine hundred and thirty-five.

[Seal United States Court of Appeals for the District of Columbia.]

HENRY W. HODGES,
*Clerk of the United States Court of
Appeals for the District of Columbia.*

Allowed by
GEORGE E. MARTIN,
*Chief Justice of the United States Court
of Appeals for the District of Columbia.*

19 Municipal Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Blanche Neff, Clerk of the Municipal Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 18, both inclusive, to be a true and correct

transcript of the record, according to direction of counsel herein filed, copy of which is made part of this transcript, in Cause, at Law, No. 305,630, wherein George Blanks, is plaintiff, and Melvin C. Hazen, George E. Allen, Daniel I. Sultan, constituting The Board of Commissioners of the District of Columbia, defendants, as the same that remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 14th day of January, 1936.

[Seal Municipal Court of the District of Columbia.]

BLANCHE NEFF,
Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 6623. George Blanks, plaintiff in error, vs. Melvin C. Hazen, George E. Allen, and Daniel I. Sultan, constituting the Board of Commissioners of the District of Columbia. United States Court of Appeals for the District of Columbia. Filed Jan. 14, 1936. Henry W. Hodges, Clerk.

(7489-C)

FILED APR 15 1936

Mona Brooks

CLERK

IN THE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

JANUARY TERM, 1936.

—
No. 6624.
—

MORRIS SINGER AND JACK NEISTADT, *Appellants,*

v.

BENJAMIN D. FRIEDMAN AND THE MUNSEY TRUST
COMPANY, *Appellees.*

—
BRIEF FOR APPELLEES.
—

ALFRED M. SCHWARTZ,
Attorney for Appellee,
Benjamin D. Friedman.

RUDOLPH H. YEATMAN,
Attorney for Appellee,
The Munsey Trust Company.

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BRIEF FOR APPELLEES.

**CORRECTIONS OF APPELLANTS' STATEMENT
OF FACTS.**

Under the heading "Facts" the appellants set out in numbered paragraphs matter to which there are no corresponding averments in any portion of the Bill of Complaint as amended.

In paragraph two at page three it is stated that the Trust Company "*generally counseled and advised said*

partnership as a fiscal agent and trustee." The bill contains no such averment.

Paragraph three states the Trust Company "was charged with the duty, at all times, of rendering regular accountings to appellants and appellee Friedman." No such averment is made.

In paragraph four, page five, they state the Trust Company filed without the consent of appellants a bill in equity against Isador Young to collect a deficiency. There is no such allegation in the bill. True the appellants allege that they never consented to the acceptance of \$7500 in payment of this claim but they later make mention of that on the same page of the brief, namely, that the Trust Company "accepted \$7500 in full satisfaction of said deficiency, although said Young was solvent and good for the whole sum and so accepted said amount without the consent or approval of appellants." There is also no charge in the bill which supports the portion above quoted that Isador Young was solvent and good for the whole sum.

In paragraph five, pages five and six we find it said "that the books and records of the receipts and disbursements of all the real estate of said partnership, the proceeds of sale of mortgages thereon, the proceeds from foreclosures, and other receipts, etc., were *all* in the possession of the said Trust Company and access thereto not given or furnished." Nowhere in the bill or amendment is there any such averment. The nearest thing to it is in paragraph thirteen of the bill (R. p. 9) where, referring to their demand for an accounting on June 28, 1935, long after the dissolution of the partnership and two weeks before filing their bill, the appellants aver that much of the record information as to said transactions were made and kept by said

Trust Company and many of the facts were peculiarly within its knowledge.

Neither the bill nor the amendment contains any averment in the way of a fraudulent misrepresentation of any fact. (See the fourth ground in each of the Motions to Dismiss, R. pp. 23, 25.) Yet on page eight paragraph seven of their brief the appellants say:

“That in furtherance of said cooperation and conspiracy between Appellee Friedman and said appellee Trust Company, *false and fraudulent information was communicated to Appellants to the effect that unless they accepted the insignificant sum of \$8,000 for their two-thirds share of the assets of said partnership, worth more than \$100,000.00, and represented by \$110,000 in cash and valuable real estate equities, they would get nothing; * * ** being put in fear of a loss of everything by the false and fraudulent information communicated to them by Appellee, ** * ** they were fraudulently induced to execute Exhibit A” (release. Italics ours).

There is not even the semblance of an averment in the bill as amended to support the above statement in their brief.

On account of the numerous inaccuracies in their brief, we are constrained to preface our argument with our own statement of the contents of the bill as amended even though in doing so we are compelled to extend the length of the brief.

STATEMENT OF CASE.

This is an appeal by the plaintiffs below, Morris Singer and Jack Neistadt, from a decree dismissing their bill of complaint as amended upon separate but

identical motions to dismiss filed by the appellees, Benjamin D. Friedman and The Munsey Trust Company (R. pp. 23, 24).

The bill alleges that on April 2, 1928 the appellants, Singer and Neistadt, and the appellee, Friedman, entered into a partnership for the conduct of a real estate and construction business in the District of Columbia, (R. p. 2) and that the partnership was dissolved by mutual agreement in April, 1931 (R. pp. 12, 14); that during the existence of the partnership the appellee, Munsey Trust Company, "became a trustee, depository and fiduciary financial agent for the partnership and each member thereof"; that on January 1, 1931 and while the partnership was still in existence the said Trust Company had in its possession cash in the sum of \$35,000, realized from the sale of a second trust note, and at said time the partnership also owned certain pieces of real estate all of which were subject to first trusts held by the appellee Trust Company for moneys loaned by it to the partnership; that a foreclosure sale was made on January 19, 1931 on one of said properties under which the said property was purchased by the appellee Friedman who paid to the Trust Company the sum of \$45,000 for the benefit of the partnership, and later (whether before or after the dissolution of the partnership is not disclosed by the bill) the Trust Company sued one Young for a deficiency of \$18,172.42, out of which suit there was collected by way of compromise the sum of \$7,500. The appellants state they never consented to this settlement and ask for an accounting for the difference between the \$7,500 and the sum of \$18,172.42 (R. p. 5). It also appears from the bill that for some time prior to January 14, 1933 (R. p. 3) negotiations were con-

ducted between the appellants and Friedman for a dissolution of the partnership and that the partnership was finally dissolved and terminated in April, 1931 when the appellants and appellee Friedman entered into an agreement (R. p. 12) wherein it was agreed that the appellee Friedman would pay to the appellants \$6,000 in cash and deliver to them his note dated April 10, 1931, for \$2,000, payable in monthly installments of \$100, that he would relieve the appellants of all partnership liabilities and debts, exhibit to them marked paid and cancelled all notes theretofore signed by them in connection with said partnership; and the appellants in turn agreed to release The Munsey Trust Company from any and all claims including any claims against The Munsey Trust Company arising by virtue of and under a trust arrangement with the partnership created by an assignment *which set out specifically all of the property and assets in the Trust Company's hand belonging to said partnership*, and the appellants further agreed to assign and transfer to the said appellee Friedman all the property and assets of the partnership which were embraced in this assignment theretofore executed to the Munsey Trust Company (R. pp. 12, 13). It was further agreed that the appellants and the appellee Friedman would exchange mutual releases.

Pursuant to this contract, a release was subsequently executed (Exhibit B, R. pp. 13, 14) by which the appellants among other things acknowledged receipt of the \$6,000 cash payment and the \$2,000 note of the appellee Friedman and released the appellees, Friedman and The Munsey Trust Company of and from all manner of action or actions, cause or causes of actions, suits, debts, dues, sums of money, accounts, reckoning, bonds,

bills, specialties, covenants, contracts, controversies, agreements, promises, damages, judgments, claims and demands whatsoever in law or in equity which against them the appellants ever had, then had, or which their heirs, executors, administrators or assigns thereafter could, should or may have upon or by reason of any matter, cause or thing whatsoever and especially releasing the appellees from any claim that the appellants may have by reason of a certain partnership theretofore existing between Friedman, Singer and Neistadt and against the Trust Company as trustee.

The charge in the bill upon which the appellants must rely to set aside the above mentioned agreement and release is that in March, 1931, a month or more prior to the actual execution of said dissolution agreement the appellant Singer interviewed the appellee Trust Company and requested of Mr. Pope, its Vice-President, a full and complete accounting of all the funds and properties owned by the partnership and that Mr. Pope failed and refused to give him any of this information, which information the appellants in their bill allege Singer desired in order to determine the course he should take as to these properties and the funds held by the trustee, and further the appellants say (Paragraph 7, R. p. 6) that the refusal on the part of the Trust Company to furnish this information greatly alarmed the appellants and placed them in a state of bewilderment concerning the condition of the properties and the funds in the hands of the Trust Company; that this information was refused the appellants by the Trust Company because of an unlawful and fraudulent understanding between it and the appellee Friedman in order that the latter might gain an advantage

over the appellants and frighten them into disposing of their interest at a price less than its real value.

On motions filed by the appellees the bill was dismissed by Mr. Justice Proctor on the ground of laches with leave to the appellants to file an amended bill (R. p. 20). The amendment (R. pp. 21, 22) to the bill filed to avoid the application of the statute of limitations and the laches of the appellants asserts that the facts recited in the bill were only discovered by the appellants and made known to them in a manner sufficient and definite about May 15, 1935; that about June 1, 1934, being suspicious of the conduct of the appellees, particularly the Trust Company for its refusal to permit access to the information in its possession, they consulted an attorney on June 5, 1934 whom they asked to investigate the merits of their belief and that their only information from that date to May 15, 1935 was too indefinite and uncertain upon which to base a suit. On May 20, 1935 they employed their present counsel who investigated the books and records in the District of Columbia and other sources of information to them furnished by appellants and that this information disclosed the allegations of fact above recited and that they thereupon instituted this suit.

After the filing of this amendment the motions to dismiss the bill of complaint as amended were filed by the appellees and argued before Mr. Justice Jennings Bailey, who entered a decree dismissing the bill as amended, from which decree the present appeal was taken.

ARGUMENT.**I.****The Bill of Complaint Alleges no Actionable Fraud
and is Without Equity.**

It will be observed that at no place in the bill or the amendment is it alleged that the appellees or either of them made any misrepresentation of fact to the appellants or that they or either of them concealed from them any fact which could or did mislead or deceive the appellants. The sole charge made by the bill is that the Trust Company on March 1, 1931, refused to give to the appellants the status of their accounts. After this refusal the appellants did nothing about it, and a month or more afterwards, notwithstanding the alleged refusal of the Trust Company to give the requested information, and without renewing the alleged request or complaining against the alleged action of the Trust Company, they entered into the agreement referred to as Exhibit A and still later executed the release referred to as Exhibit B. It is also stated in the bill that the agreement of settlement and the execution of the release were wrongfully procured by the appellees from the appellants who were induced to enter into them because of the denial to them of information and that if the information had been furnished the appellants would have demanded a distribution of the assets of said partnership in equal parts to themselves and the appellee Friedman after the payment of all outstanding debts and obligations to the Trust Company and other persons. Whether such a distribution would have resulted in the payment of more to the appellants than what they actually received is not disclosed by the bill since the liabilities of the partnership to others

than the appellee Trust Company are not disclosed by any averment in the bill as amended.

The general rule is that the mere failure of a party to a contract to disclose facts is not such fraud as to entitle the other party to avoid the contract. 13 C. J. 383, Sec. 281. But assuming the parties were entitled to a full disclosure from either of the appellees, there must be such a concealment as would cause the appellants to omit to make inquiry or further inquiry. Here nothing was concealed. The information they asked for was not concealed but refused. Nothing was misrepresented.

In fact the bill attaches as Exhibit A (R. p. 12) the agreement made in April, 1931, between the appellants and appellee Friedman, in which the appellants and the appellee Friedman state that all of the "property and other assets" of the partnership were held by The Munsey Trust Company under an assignment theretofore made "which assignment specifically sets forth *all the property and assets of the said partnership.*" The assignment does not appear as an exhibit to the bill. It is not alleged in any part of the bill that the statement of the property and assets of the partnership set forth in the assignment was in any particular inaccurate, and the only inference that can be drawn from these allegation is that this assignment contained an itemization or statement of all of the assets of the partnership and, therefore, that the appellants at the time of the execution of the said agreement and the subsequent execution of the release had full knowledge of the same. And nowhere in the bill is it alleged that in fact the assets of the partnership at the time of the settlement were different in any way from the assets set forth in that assignment.

In these circumstances it was their duty in the exercise of due diligence to go on and compel the furnishing of the information if they desired it; not to sit supinely by and make their contract, accept and retain the benefits thereof; then with a rise in the real estate market during the ensuing years complain more than four years later that they have been defrauded. The rule is exceedingly well stated in *Cleaveland v. Richardson*, 132 U. S. 318, 329, 330, where the Court quotes from two New York cases:

“In a case very like the one before us, (*Dambmann v. Schulting*, 75 N. Y. 55) it was held that a party can commit a legal fraud, in a business transaction with another, only by fraudulent misrepresentations of fact, or by such conduct or artifice, for a fraudulent purpose, as will mislead the other party, or throw him off his guard, and cause him to omit inquiry or examination which he would otherwise make; that where there is no such relation of trust or confidence between the parties as imposes upon one an obligation to give full information to the other, the latter cannot proceed blindly, omitting all inquiry and examination, and then complain that the other did not volunteer to give the information he had; that ignorance of a fact extrinsic and not essential to a contract, but which, if known, might have influenced the action of a party to the contract, is not such a mistake as will authorize equitable relief; and that, as to such facts, the party must rely upon his own vigilance, and, if not imposed upon or defrauded, will be held to his contract. That was an action brought to set aside a release under seal, on the ground that it was inoperative, because obtained by misrepresentation and a concealment of material facts. It was not found that there was any fraudulent misrepresentation, and

there was none in fact, and there was no misrepresentation of any kind, nor was there any fraudulent concealment of any facts; nor was any statement or artifice used to throw off from his guard or to entrap or mislead the party executing the release. The court says in its opinion: 'A party buying or selling property, or executing instruments, must, by inquiry or examination, gain all the knowledge he desires. He cannot proceed blindly, omitting all inquiry and examination, and then complain that the other party did not volunteer all the information he had.' These views were reaffirmed when the case was again before the court, in 85 N. Y. 622.

In *Graham v. Meyer*, 99 N. Y. 611, it was held that a compromise made by a debtor with his creditor cannot be assailed on the ground that the debtor omitted to disclose his financial condition; and that where he is not questioned in regard thereto, and does nothing to mislead, he is not bound to make any such disclosure. It was claimed in that case that, although there was a failure to show that any fraudulent representations were made on the part of the debtor to induce the compromise, yet it ought to be set aside on the ground of the undue concealment by the debtor and his attorney of the true condition of the estate of the debtor, which he had assigned under a general assignment for the benefit of his creditors. The court said: 'But the defendant was not bound to make any disclosure of his financial condition. He was not asked to make any. He made no misrepresentations, and did nothing to mislead Graham, or prevent him from inquiring, or to throw him off from his guard. They negotiated at arms' length. The defendant was in no trust or confidential relation with him. It is true that he had made an assignment, and had thereby created a trust for Graham's benefit. But he was not the trustee. He bore the simple rela-

tion to him of debtor, and he had the right to make the best compromise with him he could, using no fraud or culpable artifice to accomplish the result. Each party to such a compromise has the right to the advantage which his superior skill, foresight and knowledge may give him. The business of the world can be conducted upon no other basis. If either party desires information from the other, he must ask for it; and then he must not be misled or deceived by answers given."

The concealment or failure to disclose, which under some circumstances may amount to a fraud, must be an active concealment which lulls the other party into a feeling of security and in the final analysis is predicated upon an estoppel. The refusal of the appellee Trust Company to give Singer the information he asked did not lull the appellants into any feeling of security nor give rise to any doctrine of estoppel. On the contrary they state they were greatly alarmed by it. (R. p. 7.) But instead of seeking an accounting before entering into a contract for the dissolution of their partnership, the appellants elected to make their settlement upon the information already in their possession. After making their settlement they accepted the benefits which were paid and performed at that time, and also continued for a period of twenty months without complaint to accept the monthly installments provided for in their contract of settlement.

Certainly more than the mere alleged refusal of The Munsey Trust Company to inform the appellant Singer of the status of the partnership account is required to entitle the appellants to rescind their contract with the appellee Friedman.

In Bigelow's Treatise on the Law of Fraud, it is stated at page 311:

“Partners are presumed to have equal access to and knowledge of the books and business of the firm; and, in the absence of any evidence contrary to this presumption, they stand upon an equal footing in inter-alienations of their respective interests.”

To allege a case of actionable fraud it is necessary to set forth that there was a representation or a concealment by the defendant of a material fact; that the representation was false or that the concealment consisted of silence when in conscience the defendant should have spoken and that the defendant's silence produced a false impression on the mind of the plaintiff (Kerr on Fraud and Mistake, p. 127—Am. Ed.); that the defendant knew that the representation or the impression on the plaintiff's mind was false; that the defendant made the representation or concealment with the intent that it should be acted upon by the plaintiff; and that the plaintiff acted and relied upon it to his damage.

Applying this test to the averments of the bill we do not find a single element present. There is no deception charged and since there was no fact misrepresented there is no misrepresentation upon which it could be said that the appellants relied. Finally there is no averment in the bill that the appellants were damaged or suffered any loss.

In the case of *Geddes' Appeal*, 80 Penn. St. 442, 460, it was held that one partner will not be permitted to say that the other partners who stand on an equal footing with him, misrepresented his interest and in such a case that it was not necessarily a fraud because

the latter bought the former's interest through a third person, concealing the real nature of the purchase. The court said:

“In this case we have the fact in proof that the relations between the plaintiff and his partners were not of the most amicable kind. This circumstance may have induced the latter to conceal their real purpose. It is said that if the plaintiff had known who the actual purchasers were, it would have put him upon his guard, and perhaps induced him to demand a higher price for his interest. This, if true, raises no equity. The argument, to be worth anything, must go to the extent of supposing that the plaintiff would have used the information for the purpose of exacting a greater price than his interest was worth. For if he got its value, how was he injured? It is possible the defendants had this in view in withholding the information from him. They had a right to buy upon as good terms as they could, provided they did no wrong to the plaintiff.”

In almost every paragraph of the bill appellees are charged with wrongfully doing this or fraudulently doing that and probably the best example of the appellants' wholesale use of the word “wrongful” and “fraudulent” is contained in paragraph 9B of the bill as amended (R. p. 2) where the appellants state that the appellees fraudulently confederated together, and disregarding their duties to the partnership, entered into a business corporation which was fraudulent and wrongful; but nowhere in the bill is the court told by any averment of fact what it was that the appellees did which constituted fraud. As has been said so many times by the courts, a charge of fraud should be distinctly stated. It should be certain both as to the con-

duct, characterized as fraudulent, and as to the parties intended to be accused. This requirement is not observed in the present bill as amended.

In the case of *Street v. Maddux, Marshall, etc.*, 58 App. D. C. 42, 44, which was a suit at law on a declaration wherein it was alleged that the plaintiff entered into a contract in reliance on defendant's misrepresentation of material facts or because of concealment of material facts it was bound to disclose, it was held that the declaration was insufficient because it failed to set out the facts so concealed or misrepresented:

“An allegation that a party is guilty of fraud amounts to nothing more than a statement of a conclusion of law and gives to the adverse party no information whatever as to the facts upon which that conclusion is based.”

In the case of *Fogg v. Blair*, 139 U. S., 118, the court held at page 127, that one who impugns the good faith of a transacton must

“state the essential, ultimate facts upon which his cause of action rested, and not content himself with charging generally that what was done was ‘colorable,’ ‘a fraud,’ ‘a breach of trust,’ and ‘a scheme’ by which the contractors were to get the stock without paying for it. These are allegations of legal conclusions merely, which a demurrer does not admit.”

In the case of *Peck v. Haley*, 21 App. D. C., 224, 237, the court said:

“Mere general allegations that the conveyance of the legal title to Haley from the surviving trustee was fraudulently acquired are insufficient. The facts which constitute the fraud or excuse the delay must be specifically stated.”

In 12 R. C. L., 419, Sec. 166, the rule is laid down as follows:

“In order properly to plead fraud, a bill, complaint, or answer must contain averments of all the elements thereof. Thus, it must show that the representation made the basis of the charge of fraud was made by the defendant, or with his authority, that it related to a material fact, that it was false, that it was made under such circumstances that the person to whom it was made had a right to rely on it, and that he did in fact rely on it, and that he was damaged in consequence.”

The bill falls far short of any of these requirements. It does not disclose what the accounting by the appellee Trust Company would have disclosed if furnished, what knowledge or information the appellants then possessed when they demanded of the appellee Trust Company the information and what misinformation if any they had which a knowledge of the true facts would have corrected, and finally to what extent the appellants were damaged by the refusal to give this information.

The bill avers that the refusal of the Trust Company to give to the appellant, Singer, the information which he requested was the result of an illegal and wrongful confederation of the appellees and yet no averment of fact is made as to the manner or means by which they confederated, or what, if anything, the appellees did.

The bill alleges that The Munsey Trust Company was trustee for the partnership but no facts are stated in the bill concerning the nature of the trust or the obligations imposed upon the trustee except that it was possessed of certain assets of said partnership, han-

dled the collection of rents from real estate belonging to said partnership and disbursements for the maintenance of said real estate. There is no averment concerning the exercise by the trustee of any duties involving its discretion and the inference from the bill is that the only duties imposed upon the Trust Company were to act as a rental collecting agent, and in so far as it was possessed of assets of the partnership it held these to secure its advances and loans to the partnership. It certainly was not a trustee in the sense of acting in any fiduciary, confidential or advisory capacity. It is not claimed that the Trust Company held title to any of the real estate of the partnership and involved in the settlement between the partners.

II.

The Fraud Alleged to Have Been Perpetrated by the Appellees Was Settled and Adjusted and a Release of the Appellees Executed and Delivered.

The charge of fraud is the refusal by the Trust Company on March 1, 1931, to inform the appellant, Singer, of the status of the partnership account. Since according to the bill of refusal was made to him personally he necessarily knew of it immediately. The appellants at the very moment of the refusal were entitled to go into equity and demand the accounting which it is alleged had been refused them.

With the course open to them of insisting upon their right to an accounting or of waiving it and making a contract for the release of this right, the appellants elected to follow the latter course (R. pp. 12, 14) accepting under the contract from the appellee Fried-

man the consideration provided, for the release of their right.

Southern Trust Co. v. Vaughn, 277 Fed. 145, 149.
Jewett v. Moses, 46 D. C. App., 314.

The compromise and settlement of disputed claims are favored in the law, and in the absence of fraud or mistake, a court of equity will not aid a party to an action to violate a settlement voluntarily entered into with the other parties.

French v. Shoemaker, 14 Wall. 314; 20 L. Ed. 852.

12 C. J. 337, Title "Compromise and Settlement", Sec. 32, 33.

III.

The Appellants' Right to Relief is Barred by the Statute of Limitations and Laches.

The appellants had the right to seek an accounting on March 1, 1931, when their request for it was refused by the Trust Company. Even if this refusal would render voidable the settlement and release which were executed in April, 1931, their delay in bringing suit for more than four years from the latter date, when the partnership was dissolved, is fatal at law and in a court of equity.

Sec. 1265 of the Code of Law for the District of Columbia provides:

"No action shall be brought for the recovery of lands, tenements, or hereditaments after fifteen years from the time the right to maintain such action shall have accrued; nor on any executor's or administrator's bond after five years from the

time of the right of action accrued thereon; nor on any other bond or single bill, covenant, or other instrument under seal after twelve years after the accruing of the cause of action thereon; nor *upon any simple contract, express or implied*, or for the recovery of damages for any injury to real or personal property, or for the recovery of personal property or damages for its unlawful detention *after three years* from the time when the right to maintain any such action shall have accrued; nor for any statutory penalty or forfeiture, or for libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment after one year from the time when the right to maintain any such action shall have accrued; and *no action the limitation of which is not otherwise specially prescribed in this section shall be brought after three years* from the time when the right to maintain such action shall have accrued."

It is well settled that the statute of limitations will run against the commencement of an action in equity for an accounting and settlement between partners or their representatives.

47 C. J. 1207—Title "Partnership," Sec. 917;
McKaig v. Hebb, 42 Md., 227;
Wilhelm v. Caylor, 32 Md., 151.

The general rule that the statute of limitations begins to run from the time when a complete cause of action accrues applies to suits for partnership accountings so that in each case the statutory period is to be computed from the time when the cause of action set forth in the complaint matured.

Bradford v. Spyker, 32 Ala. 134;
Bonney v. Stoughton, 122 Ill. 536; 13 N. E. 833;
Coalter v. Coalter, 40 Va. 79;

Fellowes v. Johnson, 91 App. Div. 611, 86 N. Y. S. 436;

37 C. J. 797, Title "Limitations of Actions," Sec. 145;

47 C. J. 1207, Title "Partnership," Sec. 917; and cases thereunder in Note 69.

In an opinion by Justice Alvey, later the first Chief Justice of this court, deciding the case of *Wilhelm v. Caylor*, 32 Md., 151, the application of the statute of limitations, first as an absolute bar to a cause of action in equity, and secondly, by way of analogy, is so clearly expounded that we quote below rather extensively from his opinion:

"The first and leading question in the case as presented to this court is, whether, as between the original parties to the bill, the defense of limitations taken in the answer be available to defeat the right to an account?

The defense set up here is not that which is peculiar to courts of equity, founded merely upon the lapse of time and the staleness of the claim, and in reference to which the court acts upon its own inherent doctrine of discouraging, for the peace of society, stale demands, by refusing to interfere in favor of a party guilty of laches, or unreasonable acquiescence in the assertion of an adverse claim; but it is in the nature of a positive bar, created by statute, to the right asserted in the bill.

The bill is filed by one partner against another for an account and settlement of partnership affairs. At law an action of account will lie by one partner against his co-partner. And the proceeding in an action of account is very much like that had on bill in equity. The first judgment is that the defendant account with the plaintiff, which is called a judgment *quod computet*, answering to the

preliminary decree to account in equity; after which the court assigns Auditors to take and declare the account between the parties, and, upon that being done, the final judgment is, that the plaintiff recover against the defendant so much as may be found due. And, as observed by Chancellor Kent, in *Duncan v. Lyon*, it is difficult to perceive any good reason why the action of account has fallen into disuse, unless it is, as we suppose, because courts of equity, having concurrent jurisdiction with courts of law in matters of account, afford some facilities that cannot be obtained at law.

By the statute law of this state, the common law action of account is not only recognized as an existing remedy, but is required to be brought, by express limitation, within three (3) years from the time the cause of action accrued. This being the limitation to the right to have an account taken in an action at law, the question is, whether the same or a different period applies to the analogous proceeding for the same thing in equity; or, in other words, whether it be in the power of the party seeking an account, to avoid the operation of the statute by simply electing to proceed in one forum rather than another. We think the statute cannot be so evaded, and that it is equally a bar to a bill for an account in equity as it is to an action of account at law." (pp. 154, 155)

* * * * *

For, said he [referring to an opinion by Lord Camden], when the legislation had fixed the time at law, it would have been preposterous for equity, (which by its own proper authority, always maintained a limitation), to countenance laches beyond the period that law had been confined to by Parliament; and therefore, in all cases where the legal right has been barred by Parliament, the equitable right to the same thing has been concluded by the same bar. And in no less clear and decided terms

has the same doctrine been stated by Lord Redesdale, in *Hovendon v. Lord Annesley*, 2 Sch. & Lefs., 607, a case which has been repeatedly sanctioned by the decisions of this court. That learned Chancellor, in the course of his examination of the subject, said: "But it is said, that courts of equity are not within the statute of limitations. This is true in one respect. They are not within the words of the statute, because the words apply to particular legal remedies; but they are within the spirit and meaning of the statute, and have been always so considered. I think it is a mistake, in point of language, to say that courts of equity act merely by analogy to the statute; they act in obedience to it. The statute of limitations, applying itself to certain legal remedies for recovering the possession of lands, for recovery of debts, etc., equity, which, in all cases, follows the law, acts on legal titles, and legal demands, according to matters of conscience, which arise, and which do not admit of the ordinary legal remedies. Nevertheless, in thus administering justice, according to the means afforded by a court of equity, it follows the law.' He further added, that 'the statute must be taken virtually to include courts of equity; for, when the legislature, by statute, limited the proceedings at law in certain cases and provided no express limitations for proceedings in equity, it must be taken to have contemplated that equity, followed the law; and therefore, it must be taken to have virtually enacted in the same cases, a limitation for courts of equity also.'

This being a legal demand, as we have seen, but the court of equity having a concurrent jurisdiction in regard to it, it follows from the principles plainly announced in the authorities just cited, that the statute is equally a bar to it as if pleaded at law to an action of account. And so it is regarded by Judge Story, in 2 Eq. Jur., Section 1520, where he says that 'the statutes of limitations,

when they are addressed the courts of equity as well as to courts of law, as they seem to be in all cases of concurrent jurisdiction at law and in equity, (as, for example, in matters of account,) to which they directly apply, seem equally obligatory in each court. It has been very justly observed, said he, 'that in all such cases, courts of equity do not act so much in analogy to the statutes, as in obedience to them.' But, instead of its being a legal demand and the subject of an action of account at law, suppose the appellant's right to an account to be only equitable, and for which no other remedy exists but a bill in chancery, is he in any better position in reference to the defense of the statutes of limitations? Clearly not. In such case, the statute applies strictly by analogy, and bars equally as if the demand was purely legal. The bill in equity is an analogous proceeding to an action of account, and there is no reason why one proceeding should be barred and not the other. They are both equally within the reason and policy of the statute." (pp. 156, 158)

And where the equity suit is predicated upon fraud, the statutory limitation applicable to a common law action of fraud and deceit applies to the equity suit.

In *Gregg v. The Lessee*, 8 Pet. 244, 252, the court said:

"It is an admitted principle, that a court of law has concurrent jurisdiction with a court of chancery, in cases of fraud."

Also see *The Lessee v. Burke*, 12 Pet. 11, 23.
21 C. J. 40, Sec. 15.

And it was so held in the case of *Baker v. Cummings*, 169 U. S. 189. In this case, which originated from this District, a bill had been filed in equity which set out

that a partnership had existed between Cummings and Baker for the practice of law in the City of Washington, that the expenses and profits of the business were to be borne and shared equally, that the firm became attorneys for the collection of claims against the United States, and that thereafter there came a time when Cummings sold to Baker all his interest in the fees earned but not then divided, and those to be earned, and there was consequently a dissolution of the partnership as to these matters. The object of the suit was to procure cancellation and annulment of the sale of Cummings' interest in these fees and of the written instrument of assignment by which it was evidenced, on the ground of false representation claimed to have been made by Baker to Cummings in the negotiations for the sale, which representations were alleged to have brought about the consent to the sale and the execution of the assignment to carry out the same. It further appears that the first complaint by Cummings of any unfairness in the transaction was nearly three years after the sale and the suit was not brought until after three years had elapsed.

Mr. Justice White, in the course of his opinion, said (p. 206) :

“As said in *Metropolitan National Bank v. St. Louis Dispatch Co.*, 149 U. S. 436, 448: ‘Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitation which govern actions at law.’ That Cummings might at his election have pursued a remedy for the alleged fraud in a court of law is obvious. And it is equally clear that such remedy at law, by action on the case predicated on the facts as to deceit and fraud, which are alleged in the bill now before us, would have been barred in three years

from the discovery of the fraud under the Statutes of Limitation of Maryland of 1715, c. 23, Sec. 2, in force in the District of Columbia. 1 Kilty's Statutes, 111; Comp. Laws Dist. Col., c. 42, Sec. 6, p. 360. It hence follows, irrespective of the equitable doctrine of laches, that the relief which the bill seeks to obtain ought not to be allowed by a court of equity."

By the terms of the agreement set out in Exhibit A filed with the bill (R. pp. 12, 13) the partnership was completely dissolved and terminated in April, 1931, and a final winding up and distribution of its assets made. If prior to that date a trust relationship existed it ended at that time.

In *Riddle v. Whitehill*, 135 U. S. 621, 634, the court said:

" 'As a general rule, doubtless', said Mr. Justice Gray, delivering the opinion of the court in *Speidel v. Henrici*, 120 U. S. 377, 386, 'length of time is no bar to a trust clearly established, and express trusts are not within the statute of limitations, because the possession of the trustee is presumed to be the possession of his *cestui que trust*. But this rule is, in accordance with the reason on which it is founded, and as has been clearly pointed out by Chancellor Kent and Mr. Justice Story, subject to this qualification, that time begins to run against a trust as soon as it is openly disavowed by the trustee, insisting upon an adverse right and interest which is clearly and unequivocally made known to the *cestui que trust*; as when, for instance, such transactions take place between the trustee and the *cestui que trust* as would in case of tenants in common amount to an ouster of one of them by the other. * * * In the case of an implied or constructive trust, unless there has been a fraudulent concealment of

the cause of action, lapse of time is as complete a bar in equity as at law.' Courts of equity sometimes act in obedience to the statute, and sometimes apply it by way of analogy. Where the cause of action is legal and the statute has barred the remedy at law, the defense is as complete in equity as at law, but where the case falls within the proper, peculiar and exclusive jurisdiction of a court of equity the statute is not necessarily applied."

Continuing with the opinion the court reviews certain situations where after dissolution, certain steps may remain to be performed in the liquidation of the partnership, so that the time when the right of action accrues may be deferred, and when the statute of limitations is set in motion may depend upon such circumstances, and cannot always be held as a matter of law to arise on the dissolution of the partnership.

So in this connection the court says at page 636 of the opinion:

"We are not prepared to decide that there is a definite rule of law that statutes of limitation commence to run immediately upon the dissolution of a partnership, irrespective of the circumstances of the particular case. Mr. Justice Lindley, in his excellent work on Partnership, says: 'So long, indeed, as a partnership is subsisting, and each partner is exercising his rights and enjoying his own property, the statute of limitations has, it is conceived, no application at all; but as soon as the partnership is dissolved, or there is any exclusion of one partner by the others, the case is very different, and the statute begins to run.' "

It is urged by the appellants that either the twelve or fifteen year limitation applies to the action alleged in the bill and not the three year period.

Before the twelve year limitation could apply the action would have to be based or predicated upon a right created by a bond, covenant or other instrument under seal. The appellants' bill is not such an action,—it is not to enforce a right created under a sealed instrument (the release) but to nullify it.

So with respect to the fifteen year period, the bill is not to recover the possession of lands, tenements and hereditaments, but to avoid a contract of settlement and compromise dissolving the partnership, and for an accounting.

In *Luchs v. Christman*, 42 App. D. C. 326, 330, this court said:

“An action against the Commissioners to compel the execution and delivery of a tax deed is not one for the recovery of the possession of land. The holder of a tax sale certificate has no title to the land. He has the right to call for a deed, which deed will enable him to sue for the possession in case the land is held by another.”

Similarly the appellants have no title to any land described in the bill which would entitle them to sue for possession of land. As a matter of fact it is not even alleged that the appellees now have title or possession of any of the real estate described in the bill.

In summing up the general rule deducible from the decisions cited we do not wish to be understood as urging upon this court that in all cases equity is bound by the statute of limitations, but we believe the decisions to be uniform in holding that in all cases in which courts of law and courts of chancery have concurrent jurisdiction, the statutes of limitations are obligatory upon the chancery court, insofar as fixing the maxi-

mum time limit within which a bill in equity may be maintained.

As said in *Patterson v. Hewitt*, 195 U. S. 309, 318, 319:

“In an action at law courts are bound by the literalism of the statute, but in equity the question of *unreasonable delay within the statutory limitation* is still open.”

* * * * *

“* * * and we consider the better rule to be that * * * the defendant may avail himself of the laches of the complainant, notwithstanding the time fixed by the statute *has not expired*.”

The cases cited in the brief of our adversaries upon the subject of laches deal with facts which established continuing trusts. It is the same argument advanced in *Patterson v. Hewitt*, *supra*, wherein the court said at page 321 of the opinion:

“But little need be said in reply to appellants’ argument, that a trust relation was established between these parties by the oral agreement of 1883, under which Hewitt was to take possession, hold the property for the benefit of all concerned, and ultimately to convey to each his proportionate share. In this connection it is sought to apply the familiar rule that neither laches nor the statute of limitations is applicable against an express trust, so long as that trust continues. Conceding all that can be claimed as to the existence of an express parol trust in this case, the refusal of Hewitt to execute the deed to H. J. Patterson of his interest in the property, of which both appellants had notice, was a distinct repudiation of such trust, which entitled the complainants to immediate relief and opened the door to the defense of laches.”

In *Hoyt v. Latham*, 143 U. S. 553, 567, the court said:

“In cases of actual fraud or of want of knowledge of the facts, the law is very tolerant of delay; but where the circumstances of the case negative this idea, and the transaction is sought to be impeached only by reason of the confidential relations between the parties, and the *cestui que trusts* have ample notice of the facts, they ought not to wait and make their action in setting aside the sale dependent upon the question whether it is likely to prove a profitable speculation.”

One who seeks relief in a court of equity on the ground of fraud must have exercised due diligence to inform himself, and to seek such relief with reasonable promptness after he is informed of the fraud. *Foster v. Mansfield, etc., R. Co.*, 146 U. S. 88.

Courts of equity deny relief to those who delay for an unreasonable length of time in asserting their claims.

In *Badger v. Badger*, 2 Wall. 87, 94, 95, the court said:

“Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitation which govern courts of law in like cases, and this rather in obedience to the statutes than by analogy.

In many other cases they act upon the analogy of the like limitation at law. But there is a defense peculiar to courts of equity founded on lapse of time and the staleness of the claim, where no statute of limitation governs the case. In such cases, courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere where there has been gross laches in prosecuting

the claim, or long acquiescence in the assertion of adverse rights. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment, caused by the fraud or concealment of the parties in possession which will appeal to the conscience of the *Chancellor*.

The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the *Chancellor* may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the Statute of Limitations, contained in the answer."

Applying these requirements to the present bill, we find it lacking in every respect.

Also there are two salient propositions of law particularly applicable to the appellants' bill. First, appellants are held to diligence in their efforts to ascertain the facts, and means of knowledge are held to be the same as knowledge. *Norris v. Haggin*, 28 Fed. 275; *Grymes v. Sanders*, 93 U. S. 55. Secondly, delay cannot be excused except for some actual hindrance or impediment caused by the fraud or concealment of the party in possession. *Wagner v. Baird*, 7 How. (U. S.) 234; *Lansdale v. Smith*, 106 U. S. 391.

Moreover in determining whether the appellants have been guilty of laches, other considerations besides the mere lapse of time must be regarded. If the property is of a speculative nature, it is the duty of a man

complaining of fraud to put forward his complaint at the earliest possible time. He cannot be allowed to remain passive, prepared to affirm the transaction if it proves advantageous to him or repudiate it if it should be to his disadvantage. *Hayward v. National Bank*, 96 U. S. 611, 617. Again a change in the value of the property involved between the time the cause of action arose and the time the bill was filed is an element to be considered in determining the existence of laches. *Patterson v. Hewitt, supra*; *McIntire v. Pryor*, 173 U. S. 38, 54.

In *George v. Ford*, 36 App. D. C. 315, 333, this court said:

“If the situation of the parties has been materially changed during the delay,—for example, if there has been a great rise in the value of the property involved, * * * it would be inequitable, under such circumstances, to entertain his suit.”

In this connection the rise in real estate values must have largely contributed to the decision of the appellants to file their bill. From their bill it appears that the appellants and appellee Friedman in 1931 owned several pieces of real estate all of which were subject to deeds of trust. They owed money to the Munsey Trust Company for loans and other advances (R. pp. 4, 12), to the Equitable Company of Washington (R. p. 13), and to other persons. (R. p. 8.) How much these liabilities amounted to, to what extent their properties were productive of income and to what extent carried themselves are not disclosed by the bill. It does appear, however, that on January 1, 1931, the indebtedness of \$90,000.00 to the Munsey Trust Company was due (R. p. 4), and on March 1, 1931, there were

threats of foreclosure (R. p. 7). The appellants desired to be released of these obligations (R. p. 12) and when the dissolution agreement was executed in April 1931, they stipulated that the appellee Friedman protect and save them harmless from all liabilities arising from partnership indebtednesses and exhibit to them marked paid and cancelled all notes executed by them in connection with their partnership (R. p. 13).

This court may take judicial notice of the fact that in the fall of 1929 a phenomenal crash occurred in the stock market which marked the onset of a long period of economic depression and steadily declining property values. *Camerer v. Calif. Savgs. and Com. Bank*, — Calif. Rep. (2nd) —, 48 Pac. (2nd) 39, 44; *Peritz v. Taub*, 279 Ill. App. 264; *Campbell v. City of Boston*, 1935 Mass. Adv. Sheets 1173, 195 N. E. 802; *Lowden v. Iowa—Des Moines Natl. Bk. and Tr. Co.*, 10 Fed. Supp. 430.

In *Brand v. Woolson*, 120 Conn. 211, 180 Atl. 293, 295, the Court said:

“The difficulty of raising money, under existing conditions, upon any kind of security, is a matter of common knowledge.”

It was under conditions of economic stress that the appellants and appellee Friedman entered into their agreement in April 1931 for the dissolution of the partnership, assumption by Friedman of all the partnership debts including appellants' *immediate* release on notes which they had signed, besides the payment to them of \$8000, all of this at a time when every owner of real estate was hoping and praying for an opportunity to “unload”, when real estate was begging for purchasers, and foreclosure sales were not

bringing enough to cover the mortgage indebtednesses.

Compare that to the economic situation as it existed in the District of Columbia in July, 1935 when the appellants filed their bill.

At page 7 of the 52nd annual report of the Civil Service Commission for the fiscal year ending June 30, 1935 it appears that there were employed on June 30th, 1931 in the District of Columbia in the executive departments of the government, 71,693 persons and on June 30, 1935 the number had increased to 103,453.

In building construction within the District of Columbia, the report of the Government of the District of Columbia, for the year ending June 30, 1935 at page 71, shows for five consecutive one year periods ending June 30th, from 1930 to 1935 inclusive, a decrease from 1930 to 1932 of 48 per cent, a decrease from 1932 to 1934 of 55 per cent but in 1935 there was an *increase* from 1934 to 232 per cent.

The general downward trend since 1926 in real estate values in this city which was followed in 1934 with an upward turn and enhancement in values, a scarcity of residential properties and a progressive rise in rentals since 1934 are matters of common knowledge.

With these, and they are only a few of the changed conditions, the appellants wish to rescind, and from the prayer in the bill they also desire to profit from the labors of the appellee Friedman *since* the date of the dissolution of the partnership, because they ask for an accounting from the beginning of the partnership to date.

The appellee Friedman certainly had the right as did the appellants to have their partnership dissolved at any time and this right was exercised by them in April, 1931. Having dissolved their partnership the

appellants remained silent while Friedman paid the partnership debts relieved them of their liability, and paid them for their interest in the partnership.

As said in *Baker v. Cummings*, *supra*, pages 206, 7:

“Apart, however, from the bar of the statute of limitations, the facts as to the full knowledge of the fraud, if any existed, by Cummings more than three years before the filing of his bill, and his conduct after he obtained it, his permitting Baker to go on and prosecute the claims as if they were his own, debars Cummings from invoking a court of conscience to put him in a much better position than he could possibly have occupied if he had spoken and asserted his rights in due season.

There cannot be a doubt that the right existed in Baker to have dissolved the partnership at any time. If this right on his part had been exercised, Cummings would not have been in a position to have availed himself of the labors of Baker in prosecuting the future claims to a successful culmination, and would not therefore have been a participant in the profits arising therefrom. If with a full knowledge of the fraud Cummings chose to remain silent, to permit Baker to go on with the prosecution of the claims, to incur the expenditure of time and labor not only in the cases in which he was successful but in the cases in which he failed, Cummings cannot in conscience be allowed to reap the rewards which he could not possibly have obtained had he spoken with reasonable promptness, when the knowledge of the fraud if it existed was brought home to him in the most pointed and unequivocal way.”

In conclusion we quote from the language of the Supreme Court of the District of Columbia sitting in gen-

eral term in the case of *Gibbons v. Duley*, 18 D. C. Rep. 320, 328:

“A court of equity has always refused its aid to stale demands where the party has slept upon his rights for a great length of time. Nothing can call forth a court of equity into activity but conscience, good faith and reasonable diligence. Where these are wanting the court is passive and does nothing. Laches are always discountenanced. The law of courts of equity * * * is that it will not entertain stale demands.”

IV.

Appellants Have Not Restored or Offered to Restore What They Received Under the Contract of Settlement.

A party seeking to rescind must restore or offer to restore whatever he has received under the contract, and this must be done promptly, and generally before suit. His inability to restore will not ordinarily excuse him. 13 C. J. 620, 621, Title “Contracts,” Secs. 679-680.

The decisions cited by our adversaries upon this subject have no application to the case made by their bill. They each deal with the exception to the general rule where the party rescinding was entitled in any event to retain that which he had received.

As we have said before, there is no charge in the bill as to the amount of the partnership liabilities. The partnership at the time of dissolution may have been insolvent or at least possessed of assets in real estate, which were frozen, because of the state of the real estate market at that time. Certainly it cannot be said from the bill that in any event the appellants were en-

titled to at least as much as they received under the contract of settlement.

In *Lyons v. Allen*, 11 App. D. C. 543, 551, this court held that when one has received anything of value on a settlement of a right of action, and executed a release therefor, the contract of settlement, although obtained by fraud and misrepresentation, constitutes an insuperable barrier against a recovery so long as it is not rescinded or avoided by a return of or an offer to return the consideration paid for it, and this tender must be made before or at the time suit is brought.

CONCLUSION.

In conclusion we respectfully submit that the bill of complaint as amended is without equity, states no ground of actionable fraud, the cause of action alleged, to whatever extent it may be sufficient, is barred by the statute of limitations and the appellants' laches, and finally, it presents an effort on the part of the appellants to rescind a contract of settlement without restoring the benefits which the appellants received.

For these reasons both Mr. Justice Proctor and Mr. Justice Bailey in the court below each regarded the bill as insufficient, and we submit that their judgment was correct and that the decree of the lower court dismissing the bill should be affirmed.

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April 15, 1936.

